90-99

No. _____

In The

Supreme Court of the United States

October Term, 1989

NELSON A. ITALIANO,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. DOES A CABLE TELEVISION FRANCHISE GRANTED BY A COUNTY CONSTITUTE MONEY OR PROPERTY FOR PURPOSES OF A PROSECUTION FOR MAIL FRAUD UNDER 18 U.S.C. § 1341?

II. DOES AN INDICTMENT FOR MAIL FRAUD UNDER 18 U.S.C. § 1341 WHICH FAILS TO ALLEGE THE DEPRIVATION OF MONEY OR PROPERTY SAVE A SUBSEQUENT UNTIMELY INDICTMENT, WHICH DOES ALLEGE THE DEPRIVATION OF MONEY OR PROPERTY, FROM BEING BARRED BY THE LIMITATIONS PROVISIONS OF 18 U.S.C. § 3282?

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Your Petitioner, Nelson A. Italiano, respectfully requests that a Writ of Certiorari be issued to review a decision of the United States Court of Appeals for the Eleventh Circuit entered on February 20, 1990, for which rehearing was denied on April 18, 1990. The Eleventh Circuit affirmed the conviction of Nelson A. Italiano for mail fraud under 18 U.S.C. §1341.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eleventh Circuit which affirms the conviction of

Nelson A. Italiano is reported at 894 F.2d 1280 (11th Cir. 1990), and is reproduced in the Appendix at A-1. The order of the United States Court of Appeals for the Eleventh Circuit denying the Petitioner's petition for rehearing and suggestion of rehearing in banc, which is not reported, is reproduced in the Appendix at A-77. The order of the United States District Court for the Middle District of Florida denying the Petitioner's motion to dismiss and finding that a cable television franchise is property within the meaning of the mail fraud statute is reported at 701 F.Supp. 205 (M.D. Fla. 1988), and is reproduced in the Appendix at A-17. The previous opinion of the United States Court of Appeals for the Eleventh Circuit by which the Petitioner's initial conviction was reversed is reported at 837 F.2d 1480 (11th Cir. 1988), and is reproduced in the Appendix at A-23.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on February 20, 1990. (A-1.) The Petition for Rehearing and Suggestion of Rehearing In Banc were denied on April 18, 1990. (A-77.) This Court's jurisdiction is invoked under 28 U.S.C. §1254(1)(1988).

STATUTES INVOLVED

The mail fraud statute at 18 U.S.C. §1341 (1984), the statute of limitations for non-capital offenses at 18 U.S.C.

§3282 (1985), and the statute of limitations savings provision at 18 U.S.C. §3288 (1985) are reproduced in the Appendix at A-79-80.

STATEMENT OF THE CASE

The Petitioner, Nelson A. Italiano, was first indicted on May 22, 1985, for mail fraud in violation of 18 U.S.C. §1341. The conduct for which he was indicted was alleged to have ended in December, 1980. Specifically, Italiano was charged with fraudulently depriving the citizens of Hillsborough County, Florida, of their right to good government by bribing county commissioners to obtain a cable television franchise. Italiano was subsequently found guilty of mail fraud and sentenced to two years of confinement.

Shortly after Italiano's conviction, this Court issued its opinion in *McNally v. United States*, 483 U.S. 350 (1987), which held that §1341 does not protect citizens from the fraudulent deprivation of good government, but only from the fraudulent taking of money or property. Italiano appealed, and on the basis of *McNally* the Eleventh Circuit reversed his conviction in an opinion issued on February 22, 1988.[1]

On August 18, 1988, another grand jury returned a new mail fraud indictment against Italiano which alleged that Italiano's participation in the bribery scheme defrauded the government of Hillsborough County of a cable television franchise. Although the applicable statute

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[1] *United States v. Italiano*, 837 F.2d 1480 (11th Cir. 1988) [hereinafter cited as *Italiano I*].

of limitations had expired[2], the government proceeded on the basis of the savings clause in 18 U.S.C. §3288 (1985).

Italiano moved to dismiss the new indictment on two grounds. First, the applicable statute of limitations had expired, and §3288 could not save the new indictment because it alleged new facts outside the scope of the original indictment, including changes in the objectives of the fraud and the identity of the victim. Second, the new indictment failed to state the offense of mail fraud because a cable television franchise was not "money or property" as determined by this Court in *McNally*. The district court denied Italiano's motion to dismiss.[3] The court found that "approximately the same facts" were used in the second indictment which was therefore timely under §3288.[4] Without elaboration or discussion, the court also found that a cable television franchise "clearly qualifies as 'property' whether characterized as tangible or intangible property" under §1341.[5]

At his second trial, Italiano was again convicted of mail fraud. He appealed to the Eleventh Circuit which held that the first and second indictments were based upon approximately the same facts, even though the objects of the schemes alleged in the first and second indictments were "very different."[6] The Eleventh Circuit

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[2] 18 U.S.C. §3282 (1985).

[3] *United States v. Italiano*, 701 F.Supp. 205 (M.D. Fla. 1988).

[4] *Id.* at 206.

[5] *Id.* at 207.

[6] *United States v. Italiano*, 894 F.2d 1280, 1284 (11th Cir. 1990) [hereinafter cited as *Italiano II*].

affirmed the district court's denial of Italiano's motion to dismiss the second indictment. On April 18, 1990, the Eleventh Circuit denied Italiano's timely Petition for Rehearing and Suggestion of Rehearing In Banc. (A-77.) The Eleventh Circuit granted a stay of mandate pending certiorari on June 20, 1990.

ARGUMENT FOR GRANTING THE WRIT

This Court's decision in *McNally v. United States*, 483 U.S. 350 (1987), overturned a substantial series of opinions which permitted indictment for mail fraud where the object of the fraudulent scheme was an intangible, nonproprietal right, such as the right of citizens to "good government." *McNally* has been described as "a total surprise" and a "wholly unexpected explication."[7] In holding that 18 U.S.C. §1341 applied only to schemes involving property, this Court opened a new line of inquiry on the issue of what constitutes property for purposes of a §1341 prosecution. Several of the lower courts have already grappled with this problem. Similarly, *McNally* produced the issue of whether 18 U.S.C. §3288 would save a second indictment, filed after the limitations period and alleging a deprivation of a property right, after the overturning of a conviction under a first indictment alleging only the deprivation of the right of citizens to good government.

The present case provides this Court with the opportunity to resolve these two issues created by *McNally*.

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[7] *United States v. Ochs*, 842 F.2d 515, 521 (1st Cir. 1988).

The resolution would have broad applicability. As demonstrated by the opinions of the lower courts in this case, many defendants whose convictions were overturned in the aftermath of *McNally* are subject to reindictment under the provisions of 18 U.S.C. §3288. The question of what constitutes property under §1341 is an ongoing issue which also requires a uniform clarification. Both issues present important questions of federal law which have not been, but which should be, settled by this Court.

I. DOES A CABLE TELEVISION FRANCHISE GRANTED BY A COUNTY CONSTITUTE MONEY OR PROPERTY FOR PURPOSES OF A PROSECUTION FOR MAIL FRAUD UNDER 18 U.S.C. §1341?

McNally established that 18 U.S.C. §1341 (1985) is "limited in scope to the protection of property rights."[8] This decision resulted not only in the overturning of the convictions in *McNally*,[9] but also overturned mail fraud convictions in several jurisdictions.[10] Misinterpretations

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[8] *McNally*, 107 S.Ct. at 2881.

[9] *United States v. Gray*, 705 F.Supp. 1224 (E.D. Ky. 1988), (which dismissed a subsequent indictment against *McNally* on double jeopardy grounds).

[10] *See, e.g., United States v. Shamy*, 886 F.2d 743 (4th Cir. 1989); *Callanan v. United States*, 881 F.2d 229 (6th Cir. 1989); *United States v. Kato*, 878 F.2d 267 (9th Cir. 1989); *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989); *United States v. Lew*, 875 F.2d 219 (9th Cir. 1989); *Allen v. United States*, 867 F.2d 969 (6th Cir. 1989); *United States v. Hilling*, 863 F.2d 677 (9th Cir. 1988); *United States v. Mandel*, 862 F.2d 1067 (4th Cir. 1988), *cert. denied* 109 S.Ct. 3190 (1989); *Magnuson v. United States*, 861 F.2d 166 (7th Cir. 1988); *United States v. Dadanian*, 856 F.2d 1391 (9th

(Continued on following page)

of *McNally* resulted. In the present case, for example, the Eleventh Circuit concluded that *McNally* overturned the intangible rights doctrine.[11] On this point, this Court provided clarification by holding in *Carpenter v. United States*[12] that *McNally* limits §1341 to the protection of property rights whether tangible or intangible. Nevertheless, *McNally* left lower courts uninstructed on the definition of property rights as protected by §1341.

The courts have little difficulty with the concept of tangible property. Stolen automobiles are property under §1341,[13] as are kickbacks to government officials for the awarding of construction contracts.[14] As a result of *Carpenter*, and notwithstanding *Italiano I*, most courts were comfortable with the concept of information as intangible property.[15] Yet depriving a state government of material

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Cir. 1988); *United States v. Stack*, 853 F.2d 436 (6th Cir. 1988); *United States v. Lance*, 848 F.2d 1497 (10th Cir. 1988); *United States v. Brennan*, 685 F.Supp. 883 (E.D. N.Y. 1988), *aff'd* 867 F.2d 111 (2nd Cir. 1989); *Ward v. United States*, 845 F.2d 1459 (7th Cir. 1988); *United States v. Ochs*, 842 F.2d 515 (1st Cir. 1988); *United States v. Murphy*, 836 F.2d 248 (6th Cir.), *cert. denied* 109 S. Ct. 307 (1988); *Ingber v. Enzor*, 841 F.2d 450 (2d Cir. 1988); *United States v. Holzer*, 840 F.2d 1343 (7th Cir. 1988); *United States v. Baldinger*, 838 F.2d 176 (6th Cir. 1988); *United States v. Covino*, 837 F.2d 65 (2d Cir. 1988).

[11] *Italiano I*, 837 F.2d at 1482.

[12] 484 U.S. 19 (1987).

[13] *United States v. Brownlee*, 890 F.2d 1036 (8th Cir. 1989).

[14] *United States v. Little*, 889 F.2d 1367 (5th Cir. 1989).

[15] *See, e.g., Belt v. United States*, 868 F.2d 1208 (11th Cir. 1989) and *United States v. Perholtz*, 842 F.2d 343 (D.C. Cir. 1988), *cert. denied* 109 S.Ct. 65 (1988).

information is not a property violation,[16] nor is interference with voting,[17] nor is breach of a fiduciary duty.[18] Reviewing these developments, the Eleventh Circuit concluded that the only fraudulent schemes exempt from the mail fraud statute are those involving intangible, non-property, non-monetary rights.[19]

Still, this conclusion did not simplify or end the analysis. A series of opinions discovered a variety of intangible rights which might have an inherent monetary value and which might be the object of a fraudulent scheme, *but which were not property under §1341*. A permit to run a bingo game,[20] a medical license,[21] a gambling license,[22] and a zoning decision affecting the value of property[23] are exempt as objects of mail fraud. It would then appear that a grant of right, such as a license, permit, franchise, waiver or variance, by a government to an individual would not be considered as property under §1341. The Eleventh Circuit, however, has concluded that

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[16] *Covino, supra* at n.10; also *Dadanian, supra,* at n.10.

[17] *United States v. Gordon,* 836 F.2d 1312 (11th Cir.). *cert. dismissed* 109 S.Ct. 28 (1988).

[18] *United States v. Conover,* 845 F.2d 266 (11th Cir. 1988); *Ochs, supra,* at n.10.

[19] *United States v. Diwan,* 864 F.2d 715 (11th Cir.), *cert. denied* 109 S.Ct. 3249 (1989).

[20] *Murphy, supra,* at n.10.

[21] *United States v. Ferrara,* 701 F.Supp. 39 (E.D. N.Y.), *aff'd,* 868 F.2d 1268 (2d Cir. 1988).

[22] *Dadanian, supra* at n.10.

[23] *United States v. Goodrich,* 871 F.2d 1011 (11th Cir. 1989).

although a zoning decision is not property, a cable television franchise constitutes property, and a fraudulent scheme to obtain that property falls within the purview of §1341.[24]

The legal character of a franchise, however, does not justify this summary conclusion. Even through the eyes of a grantor, a franchise does not necessarily constitute property for purposes of a *McNally* analysis. If the franchiser is a county or municipal government, it has no vested proprietal right in the franchise, because the right to franchise is conferred upon local governments by the state.[25] The local government's right to franchise is considered to be a "regulatory" or "governmental" right, not a vested proprietary right, because the power to franchise may be enlarged, modified or diminished at the will of the state.[26]

This Court, in reviewing the franchise power of a city, has based its analysis on the assumption that the city had a regulatory, not proprietary, interest in franchises, and that "no proprietary interest of the city" is involved in granting a franchise.[27] Although a franchise takes the form of a contract, this form does not rise to the level of a

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[24] *Italiano II*, 894 F.2d at 1285 n. 6; *see also id.*

[25] 16A C.J.S. *Constitutional Law* §252 (1984).

[26] *Board of the County Comm'rs of Laramie v. Board of the County Comm'rs of Albany*, 92 U.S. 552 (1876); *Community Communications Company, Inc. v. Boulder*, 630 F.2d 704 (10th Cir. 1980), *reversed on other grounds* 455 U.S. 40 (1982).

[27] *Community Communications Company, Inc. v. Boulder*, 455 U.S. 40, 48 (1982).

property interest under federal common law, as a franchise is a contract only to the extent that it protects the franchisee from arbitrary revocation by the local government. A franchise may be contractual in nature as far as offer and acceptance, but a franchise is not otherwise a contract involving property rights.[28] A franchise is not even necessarily a property right for the franchisee.[29]

In the present case, the authority of Hillsborough County to grant a franchise was given by the Florida state legislature in FLA. STAT. §125.012(17) (1979), indicating under federal law that Hillsborough County did not have a vested property right in the franchise. Under Florida law, franchises are the "political rights" of the city, granted by the legislature, and as such franchises "are not protected by the constitutional provisions mentioned, which have reference only to those contracts which involve property rights."[30] The same sovereign entity which granted the franchise under scrutiny has determined that a franchise is not property. The trial and appellate courts in this case have decided otherwise.

Federal courts have repeatedly ruled that a cable television franchise is not property for the granting governmental authority. When a city grants a cable television franchise, its interest is wholly regulatory[31], and cable

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[28] *Arkansas-Missouri Power Company v. Kennett*, 78 F.2d 911 (8th Cir. 1935).

[29] *International Broadcasting Corporation v. Bismark*, 697 F.Supp. 1094 (D.N.D. 1987).

[30] *Florida v. Dade County*, 142 So.2d 79, 87 (Fla. 1962).

[31] *Central Telecommunications, Inc. v. TCI Cablevision, Inc.*, 800 F.2d 711 (8th Cir. 1986), *cert. denied* 480 U.S. 910 (1987).

television franchising is simply regulation of a market.[32] Even the Federal Communications Commission has authority over cable television franchises to the extent that it can preempt state regulations, which would have the effect of interfering with property rights if, in fact, any property rights existed.[33]

In the present case, the Eleventh Circuit found that the cable television franchise granted by Hillsborough County was property as a matter of law.[34] This finding, unfortunately, is based upon a misapprehension of Florida law.[35] In fact, an examination of Florida law reveals that a franchise is not property until granted, and once granted a franchise becomes property only to the grantee, not the grantor, and only with respect to its enjoyment and protection.[36] A government merely holds a franchise in trust for the people, and franchises are not the absolute property of anyone.[37]

This confusion over the proprietal nature of a franchise is reflected in the diverse opinions of federal courts

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[32] *City of Los Angeles v. Preferred Communications, Inc.*, 476 U.S. 488 (1986).

[33] *United States v. Southwestern Cable Co.*, 392 U.S. 157 (1968).

[34] *Italiano II*, 894 F.2d at 1285.

[35] *Cf. Italiano II*, 894 F.2d at 1285 and 12 Fla. Jur. 2d *Franchises from Government* §2, with *Florida v. Dade County*, 142 So.2d 79, 87 (Fla. 1962).

[36] *Leonard v. Baylen Street Wharf Co.*, 59 Fla. 547, 52 So. 718 (1910); *West Coast Disposal Service, Inc. v. Smith*, 143 So.2d 352 (Fla. 2d DCA 1962).

[37] *Leonard*, 52 So. at 718.

of appeal which have wrestled with post-*McNally* questions. Although the Eleventh Circuit has ruled that franchises are property within the meaning of §1341 as a matter of law,[38] the Eighth Circuit in a substantially similar case has ruled that this issue is a question of fact for a jury.[39] This ruling in *United States v. Slay* is based upon a fact pattern remarkably like the present case. In *Slay*, the defendants were accused of mail fraud by attempting to obtain a cable television franchise from the City of St. Louis. The government prosecuted on an intangible rights theory. The defendants were convicted three weeks before *McNally* was decided. On the basis of *McNally*, their convictions were overturned by the district court, and the appellate court affirmed.[40] Ultimately, the indictment against the defendants was dismissed on double jeopardy grounds.[41]

In dismissing the indictment in *Slay*, the trial court ruled that:

> a franchise, once granted by the government for valuable consideration and accepted by the individual or corporation, becomes property in the form of a binding contract between the government and the franchisee. . . . However, 'until an ordinance granting a franchise is accepted, the franchise lacks the essential elements of a contract . . . [and] is a mere proposition.' . . . The

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[38] *Italiano II*, 894 F.2d at 1285.

[39] *United States v. Slay*, 858 F.2d 1310 (8th Cir. 1988).

[40] *United States v. Slay*, 673 F.Supp. 336 (E.D. Mo. 1987), *aff'd* 858 F.2d 1310 (8th Cir. 1988).

[41] *United States v. Slay*, 717 F.Supp. 689 (E.D. Mo. 1989).

> government fails to explain how mere contemplation of an ongoing contractual relationship rises to a property right protected by the mail and wire fraud statutes.[42]

Although the *Slay* trial court appears to view the granted franchise as property, there is a flaw in this conclusion. To be convicted of mail fraud, it is necessary only to show that the defendant, "having devised or intending to devise any scheme or artifice" to defraud, sends or receives an item through the postal service.[43] It is not necessary for the government to prove that money or property was actually obtained. In *Slay*, the cable television franchise was not obtained, and the trial court concluded that an unobtained franchise is not property. As discussed above, a franchise is still not property to the government even after it is obtained by a franchisee. Yet §1341 makes no distinction between obtained and unobtained property; whether tangible or intangible, it is the legal nature of an item which determines if it is property. Therefore, the fine distinction by the trial court in *Slay* between obtained and unobtained property is inapposite to the discussion, and what remains of *Slay* is the conclusion that a franchise is not property under §1341.

This Court must become the authority on this question. Whether a franchise is property by law, or whether this is a question of fact for the jury, the holdings of both the trial and appellate courts in *Slay* conflict with the appellate decision in the present case. This disharmony reflects the confusion among courts on this issue. More

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[42] *Slay*, 717 F.Supp. at 693.

[43] 18 U.S.C. §1341.

than a simple conflict between circuits, a fundamental due process problem arises. When one circuit releases a defendant while another defendant in another circuit is punished for the same conduct under indistinguishable circumstances, this Court should not leave the matter unresolved.

II. DOES AN INDICTMENT FOR MAIL FRAUD UNDER 18 U.S.C. §1341 WHICH FAILS TO ALLEGE THE DEPRIVATION OF MONEY OR PROPERTY SAVE A SUBSEQUENT UNTIMELY INDICTMENT, WHICH DOES ALLEGE THE DEPRIVATION OF MONEY OR PROPERTY, FROM BEING BARRED BY THE LIMITATIONS PROVISIONS OF 18 U.S.C. §3282?

The *McNally* decision caused a new statute of limitations problem by creating a large class of mail fraud cases needing reassessment and reindictment by the government. When *McNally* was decided, some of these cases had matured past the five year limitations period.[44] In order to reindict the mail fraud defendants whose convictions were overturned by *McNally*, the government was compelled to file superseding indictments or new indictments[45] which amended both the objectives of the fraud and the identities of the victims as required by *McNally*. In the present case, by changing the factual basis of the

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[44] 18 U.S.C. §3282.

[45] A superseding indictment usually refers to an indictment that is returned while a valid indictment is still pending. A new indictment usually refers to an indictment returned after the pending indictment has been dismissed. *See, Italiano II*, 894 F.2d at 1282 n.2.

allegations through the use of new or superseding indictments, the government has run afoul of the basic tenets of the statute of limitations.

A superseding indictment may be filed after the statute of limitations has expired if a timely original indictment is still pending.[46] If the original indictment has been dismissed for any error, defect or irregularity with respect to the grand jury, then the filing of a new indictment is controlled by 18 U.S.C. §3288, which allows the filing within six months after dismissal of the old indictment or after the convening of a regular grand jury. (A-80).

Whether a subsequent indictment is "superseding" or "new", it is saved from the statute of limitations only if the charges and allegations in the subsequent indictment are substantially the same as those in the original indictment. The subsequent indictment must be based on "approximately the same facts" and cannot broaden or substantially amend the charges in the original indictment.[47] This requirement insures that defendants have been given timely and effective notice of the allegations, which is the underlying purpose of the statute of limitations.[48] This is to protect defendants from having to defend themselves when the basic facts of the charge may have been obscured by the passage of time.[49] Unless the

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[46] *United States v. Grady*, 544 F.2d 598, 602 (2nd Cir. 1976).

[47] *United States v. Charnay*, 537 F.2d 341, 354 (9th Cir.), *cert. denied* 429 U.S. 1000 (1976).

[48] *Italiano II*, 894 F.2d at 1283.

[49] *Toussie v. United States*, 397 U.S. 112, 114-115 (1970).

change is merely a matter of form, the indictment must be resubmitted to the grand jury for amendment.[50]

The problem, then, arises from the operative phrase "approximately the same facts", which so far has escaped definition.[51] This Court itself has never used the phrase in relation to this particular issue. Among the trial and appellate courts, there is no specific test for the government to use to determine if a new or superseding indictment is based upon "approximately the same facts" as the original indictment.

To use the present case as an example, the Eleventh Circuit ruled that the subsequent indictment was based upon "approximately the same facts" because it charged the same statutory violation, the same mailing and the same underlying transaction, being the bribe paid by the defendants.[52] The Eleventh Circuit recognized that the first indictment alleged a deprivation of good government and the second indictment alleged the deprivation of a cable television franchise, but the court found that the government could change the object of the scheme in the second indictment because objectives do not determine the nature of the underlying facts. According to the court, "underlying facts" are the "sequence of actions . . . performed as part of a scheme to secure a television franchise."[53] The "underlying facts" of the second indictment determine whether it is based on "approximately

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[50] *Russell v. United States*, 369 U.S. 749, 770 (1962).

[51] *Mende v. United States*, 282 F.2d 881, 883-884 (9th Cir. 1960), *cert. denied*, 364 U.S. 825 (1961).

[52] *Italiano II*, 894 F.2d at 1284.

[53] *Italiano II*, 894 F.2d at 1285.

the same facts" as the first indictment. The Eleventh Circuit ignored any issue created by the change of victims from "the citizens of Hillsborough County" to "the government of Hillsborough County."

This analysis fails when applied to the mail fraud statute and the facts of the present case, and conflicts with the decisions of other courts in other circuits. In alleging mail fraud, the government is required to show that a mailing occurred "for the purpose of executing such scheme or artifice" to defraud.[54] Therefore, the nature of the scheme's objective is relevant to the legal analysis. In the present case, the mailing alleged to have occurred on a particular date was made *before* certain bribes were paid to county commissioners, which purportedly deprived Hillsborough citizens of their right to good government. The same mailing, however, was made *after* the approval and the ratification of the cable television franchise which was the objective of the scheme as alleged in the second indictment. Therefore, the change of objective in the second indictment had a substantial effect on the "sequence of actions . . . performed as part of a scheme to secure a television franchise" which, by the Eleventh Circuit's own definition, constituted the underlying facts.

It is not proposed that a mere change in the objective would force the dismissal of a subsequent mail fraud indictment. Reindictments in the wake of *McNally* would necessarily have to change the objectives of the scheme. Yet where, as here, the defendant is not informed by the

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[54] 18 U.S.C. §1341.

first indictment of the sequence of actions constituting the offense in the subsequent indictment, then the defendant is not properly placed on notice of the underlying facts for purposes of reindictment after expiration of the limitations period.

In determining what is meant by "approximately the same facts" other courts have applied different standards. One court has used an entirely different standard than the one used by the Eleventh Circuit in this case.[55] In that case, the second indictment which charged false statement was based on the same transaction on the same date for the same loan on the same note in the same amount, but the alleged false statement was different from the false statement alleged in the first indictment. The second indictment, filed outside of the limitations period, was thus dismissed because it was not based on "approximately the same facts" as the first indictment. Unlike the Eleventh Circuit, the court did not hinge its conclusion upon a finding that the second indictment alleged the same statutory violation and the same transaction.

Another court in the Seventh Circuit has devised an even less strict "transactional" rule to save indictments from the statute of limitations.[56] In a subsequent untimely indictment charging mail fraud, the legal charge does not need to be identical to the legal charge in the original indictment, as long as both charges arose from the same

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[55] *United States v. O'Neill*, 463 F.Supp. 1205 (E.D. Penn. 1979).

[56] *United States v. Lytle*, 677 F.Supp. 1370 (N.D. Ill. 1988).

transaction and "the factual basis for any defenses" is identical.[57]

Yet another court has established yet another post-*McNally* statute of limitations test.[58] It has been held that where "essentially the same facts were used to charge almost identical offenses," reindictment under 18 U.S.C. §3288 is allowed.[59] As for the Second Circuit, the test is met if the wording of the subsequent indictment is precisely the same, if the subsequent indictment consolidates counts in the previous indictment, or if the subsequent indictment narrows the previous indictment by the removal of allegations.[60]

When *McNally* was decided, this Court did not prohibit the government from pursuing prosecution of the defendants whose convictions were overturned. The government was compelled, however, to alter both the theory of prosecution and the objective of the mail fraud scheme. It was foreseeable that a limitations problem would develop and that the rules allowing reindictment would prove insufficient. These conflicting post-*McNally* cases have demonstrated the inadequacy of current analysis. The present test is that a new or subsequent indictment must be based upon "approximately the same facts", but the federal courts require better direction on the meaning and application of this phrase. That direction must come from this Court.

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[57] *Id.* at 1377.

[58] *United States v. Davis*, 714 F.Supp. 853 (S.D. Ohio 1988).

[59] *Id.* at 864

[60] *United States v. Grady*, 544 F.2d 598 (2nd Cir. 1976).

CONCLUSION

McNally settled one substantive question of law but created other questions which this Court must answer. Two of these questions were raised and full delineated in this case. As local and state governments continue to grant franchises, the government must be advised whether franchises can be the objects of mail fraud. As pre-*McNally* convictions are overturned and reindictments are sought, the government requires direction to avoid further violations of the statute of limitations. To answer these questions, the Petitioner requests this Court to issue a writ of certiorari to review the judgment and decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted this 12th day of July, 1990.

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UNITED STATES of America,
Plaintiff-Appellee,

v.

Nelson ITALIANO,
Defendant-Appellant.

No. 89-3079.

United States Court of Appeals,
Eleventh Circuit.

Feb. 20, 1990.

John R. Lawson, Jr., Aileen S. Davis, Stephen O. Decker, Lawson, McWhirter, Grandoff & Reeves, Tampa, Fla., for defendant-appellant.

Terry A. Zitek, Asst. U.S. Atty., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior District Judge.

KRAVITCH, Circuit Judge:

Nelson Italiano, convicted of mail fraud, appeals from the denial of his motion to dismiss the indictment. Italiano seeks dismissal on the ground that the statute of limitations for bringing the indictment had expired before the indictment was returned. The district court found that the indictment was not barred by the statute of limitations because it alleged approximately the same facts as a previous indictment; therefore the previous

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* Honorable C. Clyde Atkins, Senior U.S. District Judge for the Southern District of Florida, sitting by designation.

indictment had given Italiano sufficient notice of the facts and charges against him. We affirm.

BACKGROUND

On May 22, 1985, a federal grand jury in the Middle District of Florida returned a forty-five count indictment against thirty persons and corporations in connection with a widespread bribery scheme in Hillsborough County, Florida.[1] In Count IV of the indictment, Italiano was charged with a single count of mail fraud in violation of 18 U.S.C. § 1341. The gravamen of the charge was that Italiano had devised a scheme to defraud the citizens of the county of their right to the honest services of the Board of County Commissioners. Italiano moved to dismiss the indictment on the ground that the mail fraud statute was only intended to reach schemes designed to cause economic loss to the victims and not those schemes designed to deprive victims of their intangible right to good government. The district court denied that motion. Italiano's trial was severed from that of the other defendants, and in January of 1987, a jury found Italiano guilty of mail fraud.

In June of 1987, the Supreme Court decided *McNally v. United States*, 483 U.S. 350, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), which held that 18 U.S.C. § 1341 does not protect citizens from the fraudulent deprivation of intangible rights, but only from the fraudulent taking of money or property. On the basis of *McNally*, Italiano appealed his conviction to the Eleventh Circuit, and on

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[1] The scheme ended in December of 1980.

February 22, 1988, a panel of this court reversed the conviction and vacated the judgment. The court found that Italiano's indictment was "fatally flawed" because it failed to allege that the victim of the scheme to defraud was deprived of money or property. *United States v. Italiano*, 837 F.2d 1480, 1483 (11th Cir.1988).

On August 18, 1988, less than six months after dismissal of the indictment, another federal grand jury returned a new mail fraud indictment against Italiano. This new indictment alleged that Italiano's participation in the bribery scheme defrauded the government of Hillsborough County of property in the form of a cable television franchise.

Italiano filed a motion to dismiss, alleging that the new indictment had been returned outside the five year statute of limitations for federal criminal offenses. The district court denied the motion. *United States v. Italiano*, 701 F.Supp. 205 (M.D. Fl.1988) and Italiano was again convicted for mail fraud.

Testimony at both trials focused on Italiano's role in a scheme to bribe the commissioners of Hillsborough County in order to obtain a cable television franchise for a company named Coaxial Communications of the Suncoast, Inc. ("Coaxial"). Coaxial was primarily interested in obtaining the cable franchise for the City of Tampa, Florida, but decided to establish a presence in the area by securing franchises in Hillsborough County. The Hillsborough County Board of County Commissioners had the final authority to award cable television franchise rights within the county. Italiano secured the support of County Commissioner Bean for Coaxial and introduced Bean to

McGillicuddy, one of the owners of Coaxial. Bean and various other commissioners were given sums of money by Italiano and others in order to secure their support for Coaxial, and the contract between Coaxial and Hillsborough County was ratified in July of 1980. Apparently, McGillicuddy made it clear to Bean that he would sell the franchise if Coaxial failed in its efforts to obtain the Tampa franchise. Coaxial's efforts were in fact unsuccessful and McGillicuddy ultimately sold his franchise in Hillsborough County and left the area.

DISCUSSION

The statute of limitations for non-capital federal crimes states that:

> Except as otherwise expressly provided by law, no person shall be prosecuted, tried or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

18 U.S.C. § 3282. The purpose of the statutory bar is to protect defendants from "having to defend themselves against charges when the basic facts may have become obscured by the passage of time. . . . " *Toussie v. United States*, 397 U.S. 112, 114-15, 90 S.Ct. 858, 860, 24 L.Ed.2d 156 (1970). The statutory bar applies to all indictments whether they are original indictments, superseding indictments or new indictments.[2]

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[2] A superseding indictment usually refers to an indictment that is returned while a valid indictment is still pending. A new indictment usually refers to an indictment returned after the pending indictment has been dismissed.

A. The Tolling Effect of the Indictment

In certain circumstances, the filing of an indictment may serve to toll the statute of limitations for purposes of filing a superseding or new indictment after the limitations period has expired.

A superseding indictment brought after the statute of limitations has expired is valid so long as the original indictment is still pending and was timely and the superseding indictment does not broaden or substantially amend the original charges. *United States v. Grady*, 544 F.2d 598, 602 (2d Cir.1976). *See also, United States v. Edwards*, 777 F.2d 644, 649 (11th Cir.1985); *United States v. Sears, Roebuck & Co., Inc.*, 785 F.2d 777, 779 (9th Cir.1986); *United States v. Friedman*, 649 F.2d 199, 203-04 (3rd Cir.1981). For purposes of the statute of limitations, the "charges" in the superseding indictment are defined not simply by the statute under which the defendant is indicted, but also by the factual allegations that the government relies on to show a violation of the statute.

Notice to the defendant is the central policy underlying the statutes of limitation. If the allegations and charges are substantially the same in the old and new indictments, the assumption is that the defendant has been placed on notice of the charges against him. That is, he knows that he will be called to account for certain activities and should prepare a defense. *See Grady*, 544 F.2d at 601.

The case of a *new* indictment, brought after the limitations period has expired, is controlled by 18 U.S.C. § 3288, which provides that the indictment must be

returned within a certain time after the original indictment is found defective:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calender months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

18 U.S.C. § 3288.[3] The notice considerations that permit tolling in cases of *superseding* indictments apply in the case of *new* indictments as well. That is, the limitations period will only be tolled if the charges and allegations in the new indictment are substantially the same as those in the original indictment. The Ninth Circuit has held that the underlying concept of section 3288 is that if the defendant was first indicted within the limitations period, then *"approximately the same facts* may be used for the basis of any new indictment, if the earlier indictment runs into legal pitfalls." *United States v. Charnay*, 537 F.2d

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[3] In November of 1988, after the second indictment in this case had been returned, 18 U.S.C. § 3288 was amended pursuant to the Anti-Drug Abuse Act of 1988, Pub.L. 100-690, Title VII, § 7081(a), 102 Stat. 4407.

341, 354 (9th Cir.), *cert. denied*, 429 U.S. 1000, 97 S.Ct. 527, 528, 50 L.Ed.2d 610 (1976) (emphasis added) (quoting *Mende v. United States*, 282 F.2d 881, 883-84 (9th Cir.1960), *cert. denied*, 364 U.S. 933, 81 S.Ct. 379, 5 L.Ed.2d 365 (1961)). In sum, an untimely indictment can only be saved by the section 3288 exception if it does not broaden or substantially amend the original charges "tolled" by the previous indictment.

B. The Language of the Two Indictments

In order to decide whether the charges and underlying facts in the two indictments returned against Italiano are sufficiently similar to provide him with notice, we must examine the language of those indictments.

1. The first indictment

Count IV of the indictment, under which Italiano was specifically charged with violating section 1341, states that Italiano and others "would and did engage in the acts set forth in paragraph 14 of COUNT TWO of this indictment." Paragraph 14 of Count II, incorporated into Count IV, makes reference to a cable television franchise. It states that:

> Between in or about January, 1980 and in or about December, 1980, Nelson Italiano and others, corruptly offered, promised and gave Charles Frank Bean III and Robert E. Curry, public servants, and Charles Frank Bean III and Robert E. Curry, corruptly requested, solicited, agreed to accept and accepted, a benefit with an intent and purpose to influence an act which Nelson Italiano believed to be, and Charles

Frank Bean III represented as being, within the official discretion of Charles Frank Bean III and Robert E. Curry *relating to Cable Television Franchise Agreement No. 80-563*, chargeable under Florida Statutes, Section 838.015 and an act of racketeering involving bribery as defined by Title 18, United States Code, Section 1961(1). (emphasis added). Count IV of the indictment also incorporates paragraphs 1 through 3 of Count III, which set forth the objects of the scheme.[4] Paragraph 2 of Count III states that Italiano and others:

knowingly and willfully devised and intended to devise a scheme and artifice to defraud the citizens of Hillsborough County, and the citizens of the State of Florida generally of their right to the following:

> a. conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties of the Board of County Commissioners, Hillsborough County, Florida; and
>
> b. to have the business of the Board of County Commissioners, Hillsborough County, Florida, and its affairs conducted honestly and impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments and in accordance with the laws of the State of Florida and Hillsborough County.

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[4] Count III in turn incorporates paragraphs 3 through 11 of Count I of the indictment, describing the manner and means of the scheme.

2. The second indictment

The second indictment alleges that Italiano and others:

> Knowingly devised and intended to devise, and aided and abetted the devising of, a scheme and artifice (a) to defraud the government of Hillsborough County, Florida, of money and property, that is:
>
> (1) cable television franchise;
>
> (2) the salaries, emoluments, and services of elected Commissioners of Hillsborough County, Florida;
>
> (3) the value and proceeds of bribes paid to elected members of the Board of County Commissioners of Hillsborough County, Florida to induce them to violate their duty to the government and citizens of Hillsborough County, Florida, honestly, impartially, and free from deceit, graft, corruption, fraud, undue influence, dishonesty, and bribery;
>
> and (b) for obtaining from the government of Hillsborough County money and property, namely, a cable television franchise, by means of false and fraudulent pretenses, representations and promises,. . . .

Prior to trial, the government abandoned the theories of fraud listed under (2) and (3) and proceeded to trial only on the allegation that the government was deprived of a cable television franchise.[5]

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[5] Subsequently, in a case involving another member of the Hillsborough bribery scheme, the Eleventh Circuit held that

(Continued on following page)

C. *Comparison of the Two Indictments*

The first and second indictments charge the same statutory violation, the same mailing in furtherance of the scheme, and the same underlying transaction for the bribe. The difference, as Italiano stresses, is in the objects of the schemes alleged in each indictment: the first alleges a scheme to deprive the county of good government, the second alleges a scheme to deprive the county of a cable television franchise. Italiano argues that, in keeping with these different objectives, the first indictment alleged "pure good government facts" while the second indictment alleged "money and property" facts. Accordingly, he states that the first indictment provided "good government notice" but did not provide "money and property notice."

We have no quarrel with Italiano's contention that the *objects* of the schemes alleged in the first and second indictment are very different. Indeed, a panel of this court, finding the first indictment invalid, explained at length that

> [t]he allegations in the indictment, even given a broad interpretation, are only susceptible of one interpretation: that the citizens of Hillsborough County were deprived of their intangible right to "good government."

(Continued from previous page)

indictment language identical to the allegation under (2) and (3) in the instant indictment did not allege a deprivation of property rights under *McNally*. *United States v. Goodrich*, 871 F.2d 1011 (11th Cir.1989).

Italiano, 837 F.2d at 1486. Nowhere does the first indictment specifically state that the *object* of the scheme was to defraud the government of a cable television franchise. In contrast, the second indictment, returned post-*McNally*, deliberately avoids reliance on a good government theory and alleges instead that the point of the scheme was to deprive the government of property in the form of a cable television franchise.[6]

Our finding that the alleged objectives of the scheme differ between the two indictments does not end our inquiry. For, in deciding whether the first indictment tolled the limitations period, the crucial inquiry is whether approximately the same facts were used as the basis of both indictments. If so, Italiano would have been put on notice within the limitations period of the charges on which he was ultimately convicted. In characterizing the facts of the first indictment as "good government facts" and the facts of the second indictment as "money and property facts," Italiano implies that the *object* of the scheme determines the nature of the facts underlying the

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[6] As Judge Owens noted in his dissent to this court's prior opinion in *Italiano*, franchises are considered property both generally and specifically under Florida law. *Italiano*, 837 F.2d at 1493 (citing 27 Fla.Jur.2d Franchises From Government § 2 (1981)). In the words of Judge Owens:

> Clearly the cable television franchise held by the County of Hillsborough for the people of that county to be awarded to some commercial entity is "property," and the attempt by appellant to secure the cable television franchise by bribery is a scheme to deprive the county and its people of that property.

Id.

scheme. We disagree. The facts are the sequence of actions that Italiano performed as part of a scheme to secure a television franchise for Coaxial. These facts are the same in both indictments.

Italiano relies heavily upon *United States v. O'Neill*, 463 F.Supp. 1205 (E.D. Pa.1979), to argue that the factual dissimilarity of the two indictments is fatal to the second indictment. *O'Neill* involved a defendant indicted under 18 U.S.C. § 1014 for making false statements in relation to an application for a loan at a federally insured bank in order to influence the bank to approve the loan. A superseding indictment was issued outside of the limitations period. Although both the original and superseding indictments were based on the same transaction, the *O'Neill* court dismissed the superseding indictment, finding that the indictments were not based on "approximately the same facts."

We agree with the district court that the present case can easily be distinguished from *O'Neill*. In *O'Neill*, the superseding indictment involved a different false statement from the two false statements described in the first indictment. The first indictment stated that O'Neill falsely represented to the bank that the insurance policies submitted as security for the loan were in full force and effect. The second indictment stated that O'Neill falsely represented to the bank that the insurance policies submitted as security had a future cash surrender value and that they had been assigned to him.

The *O'Neill* court found that "[t]he charge in the first indictment contains no mention of the specific misrepresentations charged in the second indictment. If anything,

the first indictment would serve to draw the defendant's attention away from the misrepresentations alleged in the superseding bill." *Id.* at 1207. The court concluded that "[t]he original indictment therefore did not put the defendant on notice that he might face a revised indictment alleging two quite different misrepresentations." *Id.* at 1208.

Unlike *O'Neill,* the second indictment in this case did not introduce any material new facts not found in the original indictment.[7] For this reason, we conclude that the first indictment provided sufficient notice of the actions which allegedly constituted criminal conduct and of the type of evidence that the government would introduce at trial. We see no way in which any disparity between the first and second indictments hindered Italiano's understanding of the conduct for which he would be held accountable or his ability to prepare a defense for that conduct. *See Grady,* 544 F.2d at 601.[8]

Italiano seeks to support his assertion that the indictments are factually dissimilar by noting that the first indictment did not withstand *McNally* scrutiny, but the second one did. He argues that if the indictments *were*

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[7] The second indictment did identify the recipients of the cable television franchise and mentioned Jerry Bowmer as an unindicted coschemer. We agree with the government that these two changes are insignificant.

[8] *See also, United States v. Gengo,* 808 F.2d 1, 3 (2d.Cir.1986) (second indictment does not substantially change original charges where initial indictment informs defendant that he would have to account for alleged role in particular tax evasion schemes and later indictment adds conspiratorial object to defraud IRS related to exact same evasion schemes).

factually similar, as the government claims, then the first one would not have been dismissed. He implies that substantive notice could *only* have been achieved if the first indictment had alleged facts sufficient to allow it to be upheld under *McNally*. We disagree with Italiano's attempt to equate indictments invalid under *McNally* with indictments insufficient to toll the statute of limitations and note that at least two other courts have rejected the same argument.

In *United States v. Davis*, 714 F.Supp. 853, 864 (S.D.Ohio 1988), the district court was faced with the issue presently before this court. The *Davis* court held that a superseding indictment returned after a first indictment was found invalid under *McNally* did not impermissibly broaden the language of the indictment where the superseding indictment charged the same acts and offenses and differed only in the legal theory stated. The court wrote that "[a]lthough the government had to abandon the intangible rights theory, it does not follow that a simple change of theory automatically bars reindictment." *Id.*[9]

In *United States v. Lytle*, 677 F.Supp. 1370 (N.D.Ill.1988), the court found that an indictment for mail fraud, dismissed on the basis of *McNally*, provided sufficient notice to the defendant to render a second indictment timely because each of the underlying factual allegations in the indictment was the same. *Id.* at 1377. The *Lytle* court held that the first indictment satisfied the

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[9] On appeal of this decision, the Sixth Circuit declined to decide the issue, finding that the appeal was interlocutory. *United States v. Davis*, 873 F.2d 900, 908 (6th Cir.1989).

notice requirement because only the *form* and not the *substance* of the claim had changed. *Id.* at 1376.

Italiano seeks to distinguish *Lytle* on the grounds that the first indictments in *Lytle* made *some* mention of money or property fraud whereas the first indictment in his case alleged only a scheme to defraud of good government. We find the reasoning in *Lytle* persuasive and Italiano's efforts to distinguish it unconvincing. If we were to accept Italiano's argument, then section 3288 would be rendered essentially useless in correcting defects in indictments that stem from legal errors.[10]

In sum, the court finds Italiano's attempt to distinguish between one type of notice that he terms "good government notice" and another type of notice that he terms "money and property notice" unavailing. Italiano was aware from the first indictment that he was on trial for his part in the scheme to bribe the commissioners to vote for Coaxial as the recipient of the cable television franchise. The only difference between the two indictments is the alleged objective of the scheme. This is not enough to deprive Italiano of notice and take the second indictment out of the section 3288 exception. Accordingly,

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[10] We agree with other courts of appeals that have addressed the issue that § 3288 is available to correct legal defects as well as grand jury defects or irregularities. *See Charnay*, 537 F.2d at 355; *Davis*, 714 F.Supp. at 864; *see also, United States v. Macklin*, 535 F.2d 191, 193 (2d Cir.1976) (section 3288 applies when an indictment is dismissed "for any reason whatever"); *cf. United States v. Beard*, 414 F.2d 1014, 1017 (3d Cir.1969) (implying that § 3288 allows re-indictment after indictment is dismissed for failure to allege element of crime).

the order of the district court denying Italiano's motion to dismiss the indictment is **AFFIRMED**.

UNITED STATES of America

v.

Nelson ITALIANO.

No. 88-259 CR-T-10(B).

United States District Court,
M.D. Florida,
Tampa Division.

Oct. 18, 1988.

Terry A. Zitek, Chief, Crim. Div., U.S. Attorney's Office, Tampa, Fla., for U.S.

John R. Lawson, Tampa, Fla., for Italiano.

ORDER

HODGES, Chief Judge.

Before the Court is defendant Nelson Italiano's alternative motion to dismiss the indictment. Defendant was originally tried and convicted of one count of mail fraud, 18 U.S.C. § 1341. The Court of Appeals vacated defendant's conviction on the ground that the indictment failed to allege that either the County or State were defrauded of money or property by the defendant; it alleged only that the citizens were defrauded of their right to good government. *United States v. Nelson Italiano*, 837 F.2d 1480 (1988). Defendant was subsequently reindicted on the same charge of mail fraud. Defendant seeks to dismiss this new indictment on the basis that the statute of limitations has expired, preventing the return of the subsequent indictment, and that the indictment fails to state the offense of mail fraud. For the reasons stated below, defendant's motion must be denied.

Essentially, defendant contends that the subsequent indictment is barred by the statute of limitations because it alleges "new facts" outside the scope of the original indictment. The original indictment charged that defendant defrauded the citizens of both the County and State of their right to good and honest government. In the subsequent indictment, the "new facts" alleged are that defendant defrauded the County and State of a cable television franchise and the value of bribes as well as the salaries paid to Hillsborough County Commissioners.

Though the statute of limitations bars prosecutions after five years, 18 U.S.C. § 3282, a subsequent indictment will not be untimely if it falls within the ambit of 18 U.S.C. § 3288 which provides:

> Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or any indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment . . .

The decision in *United States v. Charnay*, 537 F.2d 341 (9th Cir.1976) interprets § 3288 such that "approximately the same facts may be used for the basis of any new indictment in the next term, if the earlier indictment runs into legal pitfalls." 537 F.2d 341, 354 (9th Cir.1976) quoting *Mende v. United States*, 282 F.2d 881, 883-884 (9th Cir.1960). By substituting "money and property" for the citizens' right to honest government as the basis for the

mail fraud indictment, defendant argues that the government has not used "approximately the same facts."

The Court finds that approximately the same facts were used in the subsequent or present indictment, and that the indictment is timely in light of § 3288. The defendant's narrow focus on the different language of the two indictments obscures their similarities. The new indictment does not allege a new or different scheme to defraud. Moreover, defendant is not charged with a new crime, based upon a different facts [sic] not found in the original indictment. Rather, the basic factual allegations of the two indictments are the same: an alleged scheme to bribe members of the Board of the Hillsborough County Commissioners in order to obtain a cable television franchise agreement.

Defendant seeks to invoke the phrase "approximately the same facts" to proscribe any changes in the subsequent indictment. However, the Court is not confined to simply matching the language of the indictments as defendant might contend. *United States v. Lytle*, 677 F.Supp. 1370, 1375 (N.D.Ill.1988). If that were true, then § 3288 would seem to have little, if any, area of operation in correcting defects. Instead, § 3288 provides that a subsequent indictment may "remedy the legal deficiencies present in the first." *United States v. Charnay, supra*, at 354.

The concept of notice to the defendant is a central purpose of the statute of limitations. *United States v. Gengo*, 808 F.2d 1, 3 (2nd Cir.1986). The statute of limitations compels that defendants be timely charged in order to prevent their "having to defend themselves against

charges when the basic facts may have become obscured by the passage of time". *Toussie v. United States*, 397 U.S. 112, 114, 90 S.Ct. 858, 860, 25 L.Ed.2d 156 (1970). In turn, "an indictment serves this doctrine by apprising a defendant 'that [he] will be called to account for [his] activities and should prepare a defense.' " *United States v. Gengo, supra*, quoting *United States v. Grady*, 544 F.2d 598, 601 (2nd Cir.1976). A subsequent or superseding indictment violates the statute only when it introduces substantial changes of which the defendant did not receive notice in the original indictment. *United States v. Gengo, supra.*

Though defendant argues to the contrary, the case before the Court is not similar to the situation found in *United States v. O'Neill*, 463 F.Supp. 1205 (E.D. Pa.1979). In that case, the original indictment alleged a single misrepresentation of "knowingly making a materially false statement" in applying for a loan. *Id.* at 1208. The superseding indictment, however, introduced new facts not found in the original. The original indictment was broadened such that two new and different misrepresentations in aid of the loan application were alleged.

By contrast, the underlying facts supporting the charge of mail fraud in this case have remained the same in both indictments. There has been sufficient notice of the facts and charge. For example, Judge Owens' dissent in *Italiano* observed that

> A plain reading of this indictment would have informed appellant that he had been charged with using the United States' mails in furtherance of a scheme to bribe county commissioners to award a cable television franchise to Coaxial based not on the competitiveness of the company's bid but rather upon Coaxial's bribe.

United States v. Italiano, 837 F.2d 1480, 1492 (1988). The subsequent indictment does nothing to broaden or expand this "plain reading." The new theory of the case does not introduce new facts outside the scope of the original notice provided by the first indictment. Thus, the new indictment does not violate the statute of limitations.

Defendant's alternative basis for dismissing the indictment is that the new indictment fails to state the offense of mail fraud. The new indictment alleges that the defendant participated in a bribe scheme to defraud Hillsborough County of "money and property:" (1) cable television franchise; (2) salaries of elected officials; and (3) the value of bribe proceeds. In contrast, the original indictment charged that the bribe scheme sought to deprive citizens of their intangible right to "unbiased services" of County Commissioners and to have the County's business conducted "honestly" and "free from deceit."

In *McNally v. United States*, the Supreme Court held that the mail fraud statute, 18 U.S.C. § 1341, was limited to the "protection of the property rights." 483 U.S. 350, ___, 107 S.Ct. 2875, 2881, 97 L.Ed.2d 292, 302 (1987). The present question, therefore, is whether a cable television franchise, salaries, or bribe proceeds qualify as "money and property" under § 1341. In regard to the cable television franchise, the Court finds that it clearly qualifies as "property" whether characterized as tangible or intangible property. The property status of the salaries and bribe proceeds, however, is less clear. *McNally, supra*, at ___ n. 10, 107 S.Ct. at 2890 n. 10, 97 L.Ed.2d at 313 n. 10 (Stevens, J., dissenting). Nonetheless, the Court finds that because the cable television franchise is within the scope

of § 1341's protection, the indictment clearly states an offense of mail fraud so that the motion to dismiss, as such, is due to be denied.

Upon due consideration, therefore, defendant's motion to dismiss the indictment is DENIED.

IT IS SO ORDERED.

DONE and ORDERED.

UNITED STATES of America,
Plaintiff-Appellee,

v.

Nelson ITALIANO,
Defendant-Appellant.

No. 87-3201.

United States Court of Appeals,
Eleventh Circuit.

Feb. 22, 1988.

John R. Lawson, Jr., Richard W. Reeves, Stephen O. Decker, Lawson, McWhirter, Grandoff & Reeves, Tampa, Fla., for defendant-appellant.

Robert W. Merkle, U.S. Atty., David H. Runyan, Terry A. Zitek, Asst. U.S. Attys., Tampa, Fla., for plaintiff-appellee.

Appeal from the United States District Court for the Middle District of Florida.

Before VANCE and HATCHETT, Circuit Judges, and OWENS*, Chief District Judge.

HATCHETT, Circuit Judge:

In this criminal appeal, we are called upon to determine whether the Supreme Court's recent interpretation of the federal mail fraud statute in *McNally v. United States*, 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) is applicable in a slightly different factual scenario. Holding that *McNally* applies, we vacate the conviction and judgment.

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* Honorable Wilbur D. Owens, Jr., Chief U.S. District judge for the Middle District of Georgia, sitting by designation.

FACTS

Appellant, Nelson A. Italiano worked for Coaxial Communications of the Suncoast, Inc (Coaxial Communications), a corporation formed for the purpose of obtaining a cable television franchise contract with the city of Tampa, Florida. In seeking to obtain the city of Tampa franchise, Coaxial Communications decided to establish a presence in the area by securing franchises in the neighboring city of Temple Terrace and in Hillsborough County. Although less lucrative, Coaxial Communications' management believed that the establishment of these franchises would enhance the company's chances of obtaining the city of Tampa franchise.

In the spring of 1980, Italiano approached Charles F. Bean, a Hillsborough County commissioner, and indicated to Bean that Coaxial Communications was interested in obtaining a cable television franchise. Italiano told Bean that the owner of Coaxial Communications was a wealthy man and that Bean might anticipate amassing great wealth if he supported Coaxial Communication's efforts to obtain the cable television franchise. After having conversations with fellow-commissioners Robert Curry and Jerry Bowmer, Bean learned that Curry and Bowmer were also committed to supporting Coaxial Communication's efforts to be awarded the franchise.

On June 11, 1980, by a margin of three-to-two, the Hillsborough County Board of County Commissioners voted to grant a cable television franchise to Coaxial Communications. County Commissioners Bean, Curry,

and Bowmer voted for Coaxial Communications; Commissioners Platt and Davin voted against Coaxial Communications. On July 23, 1980, the Hillsborough County Commission ratified the contract between Hillsborough County and Coaxial Communications by an identical three-to-two vote.

Between the time of the awarding of the franchise contract and its ratification, Italiano gave Bean envelopes containing $2,500 in cash on at least two occasions. On each occasion, Italiano told Bean that the money was from Dennis McGillicuddy, a principal of Coaxial Communications.

Ultimately, Coaxial Communications did not obtain the cable television franchise for the city of Tampa. Coaxial Communications, having obtained the franchise for the county of Hillsborough, sold that franchise and left the area.

PROCEDURAL HISTORY

In May, 1985, a federal grand jury in the Middle District of Florida returned a forty-five count indictment charging twenty-five individuals and five corporations with racketeering, fraud, extortion, obstruction of justice, and several Travel Act offenses relating to a widespread bribery scheme within Hillsborough County, Florida. The grand jury charged appellant, Italiano, with a single count of mail fraud in violation of 18 U.S.C. § 1341.

On July 10, 1985, Italiano moved to dismiss the indictment on the ground that the mail fraud statute "was only intended to reach schemes that have as their goal an

economic loss suffered by the victims and not an intangible right to good government." The district court, on December 10, 1985, denied that motion, along with all others which were pending. A jury found Italiano guilty of mail fraud, as charged in Count IV of the indictment. The district court sentenced him to two years confinement in the custody of the Attorney General.

ISSUE

The sole issue in this appeal is whether the district court erred by denying Italiano's motion to dismiss the indictment on the ground that it failed to allege that the county or state was deprived of property or money by the alleged scheme.

DISCUSSION

Italiano, relying upon the Supreme Court's recent pronouncement in *McNally v. United States*, 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987) that the federal mail fraud statute is not implicated based on the intangible right of the citizenry to good government, argues that the district court erred by not dismissing the indictment. Italiano argues that the indictment charged that he violated the mail fraud statute, but did not charge that the state or county was deprived of any money or property as a result thereof.

In response, the government admits that the indictment does not charge a deprivation of money or property. It argues, however, that a state bribery violation is still actionable under the mail fraud statute, even in light of

McNally, if it is calculated to deprive its victim of money or property.

A. The Indictment

"A grand jury indictment must set forth each essential element of an offense in order for a resulting conviction to stand." *United States v. Outler*, 659 F.2d 1306 (11th Cir.1981) (citing *Russell v. United States*, 369 U.S. 749, 82 S.Ct. 1038, 8 L.Ed.2d 240 (1962)). This rule serves a two-fold function. First, it comports with the sixth amendment requirement that each criminal defendant "be informed of the nature and cause of the accusation." Inclusion of the essential elements of the offense in an indictment will provide the accused with the minimal information necessary to satisfy this requirement. Second, and more relevant to the facts of this case, is that the fifth amendment right to an indictment for defendants charged with serious crimes is only furthered where the grand jury is able to properly perform its fact-finding function. As we stated in *Outler*, "[a] grand jury can perform its function of determining probable cause and returning a true bill only if all elements of the offense are contained in the indictment." *Outler*, 659 F.2d at 1310.

With this view in mind, we review Count IV of the indictment in which Italiano is charged with mail fraud in violation of 18 U.S.C. § 1341.[1] The essential elements of a

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[1] The federal mail fraud statute, 18 U.S.C. § 1341, provides in pertinent part: Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses,

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mail fraud prosecution are (1) a scheme to defraud and (2) the use of the mails in execution or furtherance of that scheme. *Pereira v. United States*, 347 U.S. 1, 8, 74 S.Ct. 358, 362, 98 L.Ed. 435 (1954); *United States v. Sawyer*, 799 F.2d 1494, 1501-02 (11th Cir.1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 961, 93 L.Ed.2d 1009 (1987).

Prior to the Supreme Court's pronouncement in *McNally*, several circuit courts of appeals had affirmed mail fraud convictions under expansive interpretations of the mail fraud statute. One theory which emerged as a result of liberal interpretation of the mail fraud statute is the "intangible rights doctrine." This doctrine, based on the theory that citizens have a right to honest and impartial government, has historically served as a vehicle by which the government has sought mail fraud convictions against government officials. *See, e.g., United States v. Von Barta*, 635 F.2d 999, 1005-06 (2d Cir.1980), *cert. denied*, 450 U.S. 998, 101 S.Ct. 1703, 68 L.Ed.2d 199 (1981); *United States v. Keane*, 522 F.2d 534 (7th Cir.1975), *cert. denied*, 424 U.S. 976, 96 S.Ct. 1481, 47 L.Ed.2d 746 (1976); *United States v. States*, 488 F.2d 761, 766 (8th Cir.1973), *cert. denied*, 417 U.S. 909, 94 S.Ct. 2605, 41 L.Ed.2d 212 (1974).

As explained by the Sixth Circuit in *United States v. Gray*, 790 F.2d 1290 (6th Cir.1986), *rev'd sub nom., McNally v. United States*, 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), these cases

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representations, or promises, . . . for the purpose of executing such scheme or artifice or attempting so to do [uses the mails or causes them to be used,] shall be fined not more than $1,000 or imprisoned not more than five years, or both.

> are premised on an underlying theory that a public official acts as 'trustee for the citizens and the State . . . and thus owes the normal fiduciary duties of a trustee, e.g., honesty and loyalty' to the citizens and the State. The logic continues that, as the *cestui*, the public is entitled to the faithful and disinterested services of government servants and employees, and a public official may not deprive the public of its rights.

Gray, 790 F.2d at 1294 (quoting *United States v. Mandel*, 591 F.2d 1347, 1363 (4th Cir.), *aff'd in relevant part*, 602 F.2d 653 (4th Cir.1979) (in banc), *cert. denied*, 445 U.S. 461, 100 S.Ct. 1647, 64 L.Ed.2d 236 (1980) (citation omitted)).

McNally has emasculated the vitality of the intangible rights doctrine. In *McNally*, a public official of the Commonwealth of Kentucky and another person were indicted for engaging in a kickback scheme whereby the government official, acting on behalf of the commonwealth, used his political influence to direct governmental insurance business to insurance companies in which the defendants had undisclosed financial interests. After a jury convicted the defendants on mail fraud and conspiracy counts and the court of appeals affirmed those convictions, the defendants appealed on the ground that the alleged kickback scheme was not cognizable under the federal mail fraud statute.[2]

The Supreme Court in *McNally* observed that the sparse legislative history underlying section 1341

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[2] *United States v. Gray*, 790 F.2d 1290 (6th Cir. 1986), *rev'd sub nom. McNally v. United States*, 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987).

"indicates that the original impetus behind the mail fraud statute was to protect the people from schemes to deprive them of their money or property". *McNally*, 483 U.S. at ___, 107 S.Ct. at 2879, 97 L.Ed.2d at 300. Furthermore, the Court continued, *Durland v. United States*, 161 U.S. 306, 16 S.Ct. 508, 40 L.Ed. 709 (1896), "the first case in which [the] Court construed the meaning of the phrase 'any scheme or artifice to defraud,' held that the phrase is to be interpreted broadly insofar as property rights are concerned, but did not indicate that the statute had a more extensive reach." *McNally*, 483 U.S. at ___, 107 S.Ct. at 2879, 97 L.Ed.2d at 300. Thus, the Court ultimately concluded that "[r]ather than construe the statute in a manner that leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure in good government for local and state officials, we read section 1341 as limited in scope to the protection of property rights." *McNally*, at ___, 107 S.Ct. at 2881, 97 L.Ed.2d at 302.

Having determined that the mail fraud statute was not intended to protect the intangible right of the citizenry to have public officials perform their duties honestly, the Court observed that nothing in the jury charge required the jury to find that the commonwealth was deprived of money or property. *McNally*, at ___, 107 S.Ct. at 2881, 97 L.Ed.2d at 302. Neither, the Court continued, was the jury charged "that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance" or that in order to convict, the jury "must find that the Commonwealth was deprived of control over how its money was spent." *McNally*, at ___, 107 S.Ct. at 2882, 97 L.Ed.2d at 302.

Rather, as the Court understood the jury charge, it was sufficient for the jury to find that the defendants had breached a fiduciary duty of failing to disclose their conflicts of interest, thereby depriving the commonwealth of its right to a fair and honest government. Hence, finding that the jury instructions on the mail fraud count permitted a conviction for conduct not within the purview of the mail fraud statute, the Court reversed the convictions.[3] *McNally*, at ___, 107 S.Ct. at 2882, 97 L.Ed.2d at 303.

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[3] In light of *McNally*, the Supreme Court has also vacated judgments of conviction for mail fraud based on the intangible rights doctrine in *Holzer v. United States*, ___ U.S. ___, 108 S.Ct. 53, 98 L.Ed.2d 18 (1987), *vacating United States v. Holzer*, 816 F.2d 304 (7th Cir.1987) and *McMahan v. United States*, ___ U.S. ___, 107 S.Ct. 3254, 97 L.Ed.2d 754 (1987), *vacating United States v. McMahan*, 788 F.2d 234 (4th Cir.1986). In addition, various circuit courts of appeals have also overturned mail or wire fraud convictions which were predicated on the intangible rights doctrine. *See, e.g., United States v. Herron*, 825 F.2d 50 (5th Cir.1987) (reversing wire fraud convictions where jury was not required to find that defendants "defrauded the United States out of money or property"); *United States v. Cook*, 833 F.2d 109 (7th Cir.1987) (reversing judgment in part where mail and wire fraud convictions were premised upon "defrauding an official body of intangible rights" such as "loyal and faithful services"); *United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir.1987) (reversing mail and wire fraud convictions where indictment alleged that defendant devised a scheme to deprive the Treasury Department of "Currency Transaction Reports and other 'accurate and truthful information' "); *Sigmond v. Brown*, 828 F.2d 8, 9 (9th Cir.1987) (affirming summary judgment granted in favor of defendant where alleged predicate acts of mail fraud in plaintiff's RICO action "failed to present any plausible evidence that the defendants' conduct deprived [plaintiff] of any property or money").

The indictment in this case is fatally flawed for the same reason that the jury instructions in *McNally* were infirm. Far more instructive than our mere statements applying *McNally*, however, are the revelations gained through a comparison of the jury instructions in *McNally* and the indictment in this case. Count III of the Italiano indictment alleges that Italiano, along with others,

> knowingly and willfully devised and intended to devise a scheme and artifice to defraud the citizens of Hillsborough County, and the citizens of the State of Florida generally of their right to the following:
>
> a. conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties of the Board of County Commissioners, Hillsborough County, Florida; and
>
> b. to have the business of the Board of County Commissioners, Hillsborough County, Florida, and its affairs conducted honestly and impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments and in accordance with the laws of the State of Florida and Hillsborough County.

In *McNally*, the district court informed the jury of the charges in the indictment by instructing them that:

> Count 4 of the Indictment charges in part that the defendants devised a scheme or artifice to:
>
> (a.)(1.) defraud the citizens of the Commonwealth of Kentucky and its governmental departments, agencies, officials and employees

> of their right to have the Commonwealth's business and its affairs conducted honestly, impartially, free from corruption, bias, dishonesty, deceit, official misconduct, and fraud; and
>
> (2.) obtain (directly and indirectly) money and other things of value, by means of false and fraudulent pretenses, representations, and promises, and the concealment of facts.
>
> And for the purpose of executing the aforesaid scheme, the defendants, James E. Gray and Charles J. McNally, and Howard P. 'Sonny' Hunt, Jr., and others, did place and cause to be placed in a post office or authorized deposit for mail matter, matters and things to be sent and delivered by the Postal Service, and did take and receive and cause to be taken and received therefrom such matters and things and did knowingly cause to be delivered thereon and at the place at which it was directed to be delivered by the person to whom it was addressed, matters and things.

McNally, at ___ – ___ n. 4, 107 S.Ct. at 2878 n. 4, 97 L.Ed.2d at 298-99 n. 4.

In attempting to distinguish this case from *McNally*, the government argues that a mail fraud prosecution having state bribery as a predicate is still viable in the aftermath of *McNally*. To buttress this claim, the government relies upon paragraph 2 of Count IV of the indictment which incorporates by reference paragraph fourteen of Count II.[4] Paragraph fourteen alleges that:

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[4] The government's argument must be considered in light of the fact that Italiano is not charged with bribery or any other offense in Count II.

> 14. Between in or about January, 1980 and in or about December, 1980, Nelson Italiano and others, corruptly offered, promised and gave Charles Frank Bean III and ROBERT E. CURRY, public servants, and Charles Frank Bean III and ROBERT E. CURRY corruptly requested, solicited, agreed to accept and accepted, a benefit with an intent and purpose to influence an act which Nelson Italiano believed to be, and Charles Frank Bean III represented as being, within the official discretion of Charles Frank Bean III and ROBERT E. CURRY relating to Cable Television Franchise Agreement No. 80-563; chargeable under Florida Statutes, Sections 838.015 and an act of racketeering involving bribery as defined by Title 18, United States Code, Section 1961(1).

The government's argument is premised upon the validity of remarks by Justice Stevens in his dissenting opinion in *McNally*. Justice Stevens in dissenting addressed the effect of *McNally*'s holding on cases involving intangible rights other than the general right of the citizenry to a fair and impartial government. Addressing, in particular, the effect of *McNally*'s holding on cases involving employee fraud, Justice Stevens wrote:

> When a person is being paid a salary for his loyal services, any breach of that loyalty would appear to carry with it some loss of money to the employer – who is not getting what he paid for. Additionally, '[i]f an agent receives anything as a result of his violation of a duty of loyalty to the principal, he is subject to a liability to deliver it, its value, or its proceeds to the principal.' *Restatement (Second) of Agency*, § 403 (1958). This duty may fulfill the Court's 'money or property' requirement in most kickback schemes.

McNally, at ___ n. 10, 107 S.Ct. at 2890 n. 10, 97 L.Ed.2d at 313 n. 10 (Stevens, J., dissenting). In a subsequent case, *Carpenter v. United States*, ___ U.S. ___, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), the Supreme Court arguably embraced Justice Steven's remarks regarding employee fraud.

In *Carpenter*, Winans, the co-author of a Wall Street Journal column, which because of its perceived quality and integrity had the potential of affecting stock market prices, entered into a scheme with other individuals whereby they employed advance confidential information, such as the timing and contents of the column, to buy and sell in the market based upon the probable impact of the column. As a consequence of this scheme, Winans and others were indicted for having violated a variety of securities laws and mail and wire fraud laws. In finding the defendants guilty as charged, the district court found, and the court of appeals agreed, that Winans and others had fraudulently misappropriated "property," within the meaning of the mail and wire fraud statutes, by releasing the prepublication information.

In affirming the convictions for mail and wire fraud, the Supreme Court held that the scheme to appropriate the Wall Street Journal's confidential business information was a protected property right cognizable under the mail and wire fraud statutes, and its intangible nature did not render it any less so. *Carpenter*, ___ U.S. at ___, 108 S.Ct. at 320. In so holding, the Court reasoned that "*McNally* did not limit the scope of 1341 to tangible as distinguished from intangible property rights." *Carpenter*, ___ U.S. at ___, 108 S.Ct. at 320.

In refuting the claim that revealing prepublication information amounted to nothing more than a violation of work place rules rather than conduct proscribed by the mail fraud statute, the Court noted that the term "to defraud" as used in section 1341 must be interpreted according to its "common understanding." To this end, the Court recognized that " '[i]t is well established, as a general proposition, that a person who acquires special knowledge or information by virtue of a confidential or fiduciary relationship with another is not free to exploit that knowledge or information for his own personal benefit but must account to his principal for any profits derived therefrom.' " *Carpenter*, ___ U.S. at ___, 108 S.Ct. at 321 (quoting *Diamond v. Oreamuno*, 24 N.Y.2d 494, 497, 301 N.Y.S.2d 78, 80, 248 N.E. 2d 910, 912 (1969)).

Based on the foregoing language in *Carpenter*, in this case the government contends that a mail fraud prosecution having bribery, as defined by state law, as its predicate is still cognizable under the "money or property" requirement of *McNally*. Specifically, the government argues that the county commissioners, by accepting bribes from Italiano, breached their fiduciary relationship with the county; hence, they were accountable to the county government for any profits which were derived from the bribery transactions. Notwithstanding the Supreme Court's acknowledgement that an agent is generally liable to his principal for any profits derived where the agent exploits his fiduciary relationship for his own personal gain, we need not address the merits of this argument because it is irrelevant in this case. This is not

the theory upon which the grand jury returned its indictment. In this case, the grand jury stated what it found the citizenry was deprived of – good government.

The fifth amendment provides that "No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger;. . . . " Although it is seldom that an indictment fails to fulfill its purpose – to inform the accused of the nature of the charges against him – it is well-recognized that another purpose is to be served by the requirement that an indictment set forth the essential elements of an offense. "This purpose, as defined in *United States v. Cruikshank*, 92 U.S. [2 Otto] 542, 558, 23 L.Ed. 588, 593 is 'to inform the court of the facts alleged, so that it may decide whether they are sufficient in law to support a conviction, if one should be had.' " *Russell v. United States*, 369 U.S. 749, 768, 82 S.Ct. 1038, 1049, 8 L.Ed.2d 240 (1962) (quoting *United States v. Cruikshank*, 92 U.S. (2 Otto) 542, 558, 23 L.Ed. 588 (1876)). Viewed in this light, it is evident that the rule is designed not only for the protection of the defendant, "but for the benefit of the prosecution as well, by making it possible for courts called upon to pass on the validity of convictions under [a] statute to bring an enlightened judgment to that task." *Russell*, 369 U.S. at 769, 82 S.Ct. at 1050. Of even greater relevance here is that it would hinder our task in reviewing a conviction as well as serve as an affront to our criminal justice system to permit an accused to be subject to jeopardy based on facts which were not presented to nor found by the grand jury:

> A grand jury, in order to make . . . [a] determination, must necessarily determine what the question under inquiry was. To allow the prosecutor, or the court, to make a subsequent guess as to what was in the minds of the grand jury at the time they returned the indictment would deprive the defendant of a basic protection which the guaranty of the intervention of a grand jury was designed to secure. For a defendant could then be convicted on the basis of facts not found by, and perhaps not even presented to, the grand jury which indicted him.

Russell, 369 U.S. at 770, 82 S.Ct. at 1050; *accord Outler*, 659 F.2d at 1310.

For these reasons, we express no judgment as to the cogency of the government's argument that the mail fraud statute is violated when an employee uses the mails in furtherance of a scheme to accept unauthorized compensation. Having reviewed the indictment, it is obvious that the government did not present such facts, pursue this theory when presenting facts to the grand jury, or lead the grand jury ultimately to return its indictment on such a theory. Rather, as previously mentioned, the gravamen of the indictment is that the citizens of Hillsborough County were deprived of their right to have the affairs of the county "conducted honestly and impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments and in accordance with the laws of the State of Florida and Hillsborough County." The Supreme Court has held almost exact language insufficient for a mail fraud conviction.

The allegations in the indictment, even given a broad interpretation, are only susceptible of one interpretation:

that the citizens of Hillsborough County were deprived of their intangible right to "good government." Accordingly, the government may not now seek to uphold Italiano's conviction on facts and theory different from that charged by the grand jury. We will not overlook the plain language of the indictment. As the Supreme Court admonished over a century ago: "If it lies within the province of a court to change the charging part of an indictment to suit its own notions of what it ought to have been, or what the grand jury would probably have made it if their attention had been called to suggested changes, the great importance which the common law attaches to an indictment by grand jury . . . [would] be frittered away until its value [was] almost destroyed . . . . " *Ex parte Bain*, 121 U.S. 1, 10, 7 S.Ct. 781, 786, 30 L.Ed. 849 (1886).[5]

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[5] Although we express no view concerning the government's assertion that a bribery scheme, standing alone, is a sufficient basis upon which to sustain a conviction under the federal mail fraud statute, we note that at least one court of appeals has endorsed this view. *See United States v. Runnels*, 833 F.2d 1183 (6th Cir.1987). In *Runnels*, the Sixth Circuit, after acknowledging that the intangible rights doctrine is no longer viable after *McNally*, launched what it called "an alternative rationale, based on the fraud that occurs when a fiduciary breaches his duty by appropriating an economic benefit that properly should be the principal's. . . . " At 1186. In so concluding, the Sixth Circuit reasoned thusly:

> The existence of . . . a bribe or kickback makes it unnecessary to invoke the intangible rights doctrine. The fiduciary's acquisition of an economic benefit which properly belongs to the principal, through an intentional breach of a fiduciary duty owed to the

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B. Jury Instructions

We note also that the jury instructions served only to exacerbate, rather than ameliorate, the infirmities which permeated the indictment. In reviewing the sufficiency of jury instructions, we have previously said that our task is to "examine the entire charge to determine whether, taken as a whole, it adequately presented the issues and the law to the jurors." *United States v. Hewes*, 729 F.2d 1302, 1316 (11th Cir.1984), *cert. denied sub nom. Caldwell v. United States*, 469 U.S. 1110, 105 S.Ct. 790, 83 L.Ed.2d 783 (1985). To this end, the district court must be granted wide latitude in wording the jury instructions "and will not be reversed so long as the charge correctly states the substance of the law." *Hewes*, 729 F.2d at 1316 (quoting

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principal, is in itself sufficient to support a finding of guilt under 18 U.S.C. § 1341.

> To understand why this is so, it is useful to consider the relevant elements of a conviction under section 1341 . . . : (1) a scheme to (2) obtain by deceit (3) money or property. First, the agreement between the breaching fiduciary and the person paying him constitutes a scheme. Second, the breach itself provides the necessary deception. Third, the bribe or undue profit acquired through a breach of a fiduciary duty does not properly belong to the breaching fiduciary.

Runnels, at 1187 (footnotes and citations omitted). *See also United States v. Fagan*, 821 F.2d 1002, 1010-11 and n. 6 (5th Cir.1987) (affirming mail fraud convictions based, in part, on evidence that a corporation had been deprived of its property rights "to the kickbacks its employee Riley received from [the defendant]").

United States v. Sorrells, 714 F.2d 1522, 1531 (11th Cir.1983)).

Turning to the jury instructions in this case, the district court instructed the jury as follows:

> In this case, as you know, the indictment charges the defendant in a single count, Count Four, with the commission of a mail fraud offense. Specifically it is alleged that the Defendant Nelson Italiano, together with Robert E. Curry and others, knowingly and willfully participated in a scheme to defraud the citizens of Hillsborough County and the citizens of the state of Florida generally of their right to: A, the conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performances of official duties of the Board of County Commissioners of Hillsborough, Florida; and, B, to have the business of the Board of County Commissioners, Hillsborough County, Florida, and its affairs, conducted honestly and impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments, in accordance with the laws of the state of Florida, and Hillsborough County.

So as not to belabor the point, we need only comment that the district court's jury instructions, which rely heavily on the intangible right of the citizenry to honest and fair government, are defective for the same reasons which the Court condemned the jury instructions given in *McNally*. The fact that the district court also instructed the jury that it must also find a violation of state bribery law as a predicate offense does not cure the insufficiency of the jury instructions.

CONCLUSION

We emphasize that at the time the grand jury returned this indictment, several courts of appeals had held that public officials could be successfully prosecuted under the mail fraud statute for depriving citizens of good government; unfortunately, the law changed after the return of this indictment. It is too late now for the government to claim that its indictment was returned by a grand jury cognizant of and acting in accordance with the new teachings of the Supreme Court.

We hold that the district court erred by denying Italiano's motion to dismiss the indictment where it failed to allege that either the county or state was defrauded of money or property by the alleged scheme. Accordingly, Italiano's conviction of mail fraud in violation of section 1341 is reversed and the judgment is vacated.

REVERSED and VACATED.

OWENS, Chief District Judge, dissenting:

Respectfully, I dissent.

Having been indicted in a convoluted, lengthy indictment on one count charging a violation of 18 U.S.C. §§ 1341 and 2, and having unsuccessfully moved the trial court to dismiss that count of the indictment for failure to allege an offense, appellant Nelson A. Italiano appeals his conviction, assigning as error only the trial judge's failure to grant his motion to dismiss that count of the indictment – Count Four.

The convoluted, lengthy Count Four of the indictment is set forth in its entirety as the Appendix. Appellant Italiano contends that Count Four – uncoiled,

unwound and distilled to its essence – charges that he participated in and used the United States' mails in furtherance of a scheme to deprive the citizens of Hillsborough County, Florida, of their right to have the county's affairs conducted honestly by its county commissioners, an intangible right the deprivation of which the Supreme Court of the United States in *McNally v. United States*, 483 U.S. ___, 107 S.Ct. 2875, 97 L.Ed.2d 292 (1987), held is not criminalized by the mail fraud statute. Appellee the United States points out in response that by so contending, appellant Italiano focuses narrowly on the limited portion of Count Four which alleges a violation of the citizens of Hillsborough County's rights to good government, completely ignoring the lengthy remainder of the indictment which in essence charges appellant Italiano in violation of 18 U.S.C. §§ 1341 and 2 with having participated in a scheme and used the United States' mails to bribe publicly elected commissioners of Hillsborough County, Florida, to vote in favor of awarding a county cable television franchise to a particular entity, Coaxial Communication of the Suncoast, Inc. ("Coaxial"), conduct that according to *McNally* and the Supreme Court's recent decision of *Carpenter v. United States*, ___ U.S. ___, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987), is criminalized by the mail fraud statute.

FACTS:

This case began with an indictment issued on May 22, 1985. Count Four of that indictment charged Nelson Italiano with violations of 18 U.S.C. §§ 1341 and 2. Count Four specifically realleged and incorporated by reference "paragraphs one through three of Count Three" and

"paragraph 14 of Count Two." In turn, paragraph one of Count Three specifically realleged and incorporated by reference "the Introduction of the Indictment." Paragraph three of Count Three likewise realleged and incorporated by reference "paragraphs 3 through 11 of Count One" of the indictment.

Aware of the risks both to brevity and to clarity inherent in reciting long passages from the indictment, the relevant paragraphs of the various counts will be synthesized where possible. However, in light of the Supreme Court's recent explanation of 18 U.S.C. § 1341 in *McNally*, a thorough examination of the indictment is imperative to determine the sufficiency of the indictment in the instant case.

The Introduction of the Indictment sets out the Board of County Commissioners as the chief legislative and policy-making Board for Hillsborough County, Florida. Included among the Board's described responsibilities was decision-making authority for the award of cable television franchise rights within the County. After briefly identifying the individuals and entities indicted, the indictment quoted certain relevant statutes, one of which was Section 838.015 of the Florida Statutes. That section proscribes bribery, and it defines the offense as follows:

> (1) "Bribery" means corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or another, any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within

> the official discretion of a public servant, in violation of a public duty, or in performance of a public duty.

In paragraph two of Count Three, the indictment alleged that Nelson Italiano and others "knowingly and willfully devised and intended to devise a scheme and artifice to defraud the citizens of Hillsborough County" of, among other things, the right to have the business of the Board conducted free from fraud. The indictment outlined the substance of the scheme to defraud in Count One, paragraphs three through eleven. Those paragraphs essentially described a conspiracy in which certain individuals, by and through other individuals, gave certain benefits, including pecuniary benefits, to county commissioners with the purpose of influencing the commissioners' performance of certain discretionary acts, including acts which would benefit persons with an interest in "property."

Paragraph fourteen of Count Two alleged that Nelson Italiano gave a "benefit" to certain county commissioners "with an intent and purpose to influence an act . . . within the official discretion of [those commissioners] relating to Cable Television Franchise Agreement No. 80-563. . . . " Such conduct, the indictment alleged, was chargeable under Florida Statutes, Section 838.015, *supra*.

Finally, returning to Count Four, the indictment alleged that Nelson Italiano and others, "for the purpose of executing the aforesaid scheme and artifice to defraud . . . knowingly caused to be placed in an authorized depository for mail . . . " a letter in furtherance of that scheme. Such conduct, the government alleged, was

in violation of 18 U.S.C. §§ 1341 and 2. Section 1341 as here applicable states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . , for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

Discussion:

Recently, the Supreme Court has had occasion to comment upon prosecutions pursued under the mail fraud statute. In *McNally, supra*, the Supreme Court stated that "[t]he mail fraud statute clearly protects property rights, but does not refer to the intangible right of the citizenry to good government." *McNally*, 483 U.S. at ___, 107 S.Ct. at 2879, 97 L.Ed.2d at 299-300. The Court chose to read section 1341 "as limited in scope to the protection of property rights" rather than "in a manner that leaves its outer boundaries ambiguous. . . . " *Id.* at ___, 107 S.Ct. at 2881, 97 L.Ed.2d at 302. The Supreme Court explained that the mail fraud statute, which criminalizes "schemes

or artifices 'to defraud' or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises . . . ,"[1] should not be read as establishing two types of schemes – the latter involving the deprivation of money or property and the former not involving such a deprivation. "To defraud" generally refers " 'to wronging one in his property rights by dishonest methods or schemes' and 'usually [signifies] the deprivation of something of value by trick, deceit, chicane or overreaching.' " *Id.* at ___, 107 S.Ct. at 2880-81, 97 L.Ed.2d at 301, quoting *Hammerschmidt v. United States*, 265 U.S. 182, 188, 44 S.Ct. 511, 512, 68 L.Ed. 968 (1924). Therefore, "[a]ny benefit which the Government derives from [section 1341] must be limited to the Government's interests as property holder." *Id.* 483 U.S. at ___ n. 8, 107 S.Ct. at 2881 n. 8, 97 L.Ed.2d 301-02, n. 8. However, the Court stated that the phrase "property rights" should be interpreted broadly. *Id.* at ___, 107 S.Ct. at 2879-80, 97 L.Ed.2d at 300.

In reversing appellants' convictions, the Court in *McNally* found the jury charges insufficient because "the jury was not required to find that the [victim] was defrauded of any money or property." *Id.* at ___, 107 S.Ct. at 2882, 97 L.Ed.2d at 302. The Court continued:

> It was not charged that in the absence of the alleged scheme the Commonwealth would have paid a lower premium or secured better insurance. Hunt and Gray received part of the commissions but those commissions were not the Commonwealth's money. Nor was the jury

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[1] *McNally*, 483 U.S. at ___, 107 S.Ct. at 2880, 97 L.Ed.2d at 301.

> charged that to convict it must find that the Commonwealth was deprived of control over how its money was spent. Indeed, the premium for insurance would have been paid to some agency, and what Hunt and Gray did was to assert control that the Commonwealth might not otherwise have made over the commissions paid by the insurance company to its agent. (footnote omitted).

Id.

In footnote 9, the Supreme Court expanded upon the ideas contained within the above quote. The Court stated that it should assume, because it was not alleged, that the actions of the principals in *McNally* did not violate state law. The Court noted that the "violation asserted is the failure to disclose their financial interest, even if state law did not require it, to other parties in the state government whose actions could have been affected by the disclosure." *Id.* at ___ n. 9, 107 S.Ct. at 2882 n. 9, 97 L.Ed.2d at 303 n. 9. Commenting upon Congress' power to criminalize the efforts of a state official to profit from governmental decisions in the absence of state law to the contrary, the Court said that "it would take a much clearer indication than the mail fraud statute evidences to convince us that having and concealing such an interest defrauds the state and is forbidden under federal law." *Id.* Implicit within this discussion lies the concept that the mail fraud statute does encompass a scheme involving the deprivation of money or property in violation of state law.

In a subsequent opinion, the Court explained *McNally* and said that section 1341 reaches "any scheme to deprive another of money or property by means of

false or fraudulent pretenses, representations, or promises." *Carpenter v. United States*, ___ U.S. ___, ___, 108 S.Ct. 316, 321, 98 L.Ed.2d 275 (1987). In *Carpenter*, the Court acted upon its articulated position that property rights are to be interpreted broadly. The object of the scheme in *Carpenter* was "to take the [Wall Street] Journal's confidential business information. . . . " *Carpenter*, ___ U.S. at ___, 108 S.Ct. at 320. The Court found that "[c]onfidential business information has long been recognized as property." *Id.* [citations omitted].

In this case it must first be determined whether the indictment sufficiently alleged that Italiano participated in a scheme to deprive another of money or property by means of false of [sic] fraudulent pretenses, representations, or promises. If the indictment is sufficient in this respect, the next consideration becomes whether the inclusion of the "good government" allegation in the indictment somehow prejudiced appellant.

Once again, the narrow grounds of this appeal must be noted. Appellant attacks only the sufficiency of the indictment. He attacks neither the sufficiency of the evidence nor the trial judge's instructions to the jury.[2] The sufficiency of an indictment is measured in accordance

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[2] Given the post-*McNally* state of law, the jury instructions in this case may have been erroneous. However, the Third Circuit recently affirmed a mail fraud conviction despite jury instructions heavily laced with language disapproved of in *McNally*. The court said that given the totality of the circumstances, the jury could not have convicted the appellant unless it found that an object of the scheme in which he participated was to obtain money from a particular entity. *See United States v. Piccolo*, 835 F.2d 517 (3rd Cir.1987).

with the Sixth Amendment guarantee that a defendant be informed of the government's accusations against him. *See Russell v. United States*, 369 U.S. 749, 761, 82 S.Ct. 1038, 1045, 8 L.Ed.2d 240 (1962). "In general, an indictment need contain only those facts and elements of the alleged offense necessary to sufficiently inform the accused of the charge and to safeguard the accused from double jeopardy." *United States v. Gold*, 743 F.2d 800, 812 (11th Cir.1984), citing *Hamling v. United States*, 418 U.S. 87, 117, 94 S.Ct. 2887, 2907, 41 L.Ed.2d 590, 620-21 (1974). While it is axiomatic that an indictment must contain every element of the offense charged, the law does not compel that the indictment track the statutory language. *United States v. Stefan*, 784 F.2d 1093, 1101 (11th Cir.1986). "[W]hen the indictment specifically refers to the statute on which the charge was based, the statutory language may be used to determine whether the defendant received adequate notice." *United States v. Chilcote*, 724 F.2d 1498, 1505 (11th Cir.1984), cited with approval in *Stefan*, 784 F.2d at 1101-02.

In *Chilcote*, this court stated that the "slight variation between the language of the indictment and the statute itself is cured by the indictment's reference to the statute." *Chilcote*, 724 F.2d at 1505. In *Stefan*, the indictment likewise specifically referred to the statute, and the court said that "Stefan cannot claim that he did not receive adequate notice of the charges against him." *Stefan*, 784 F.2d at 1102. "[P]ractical, rather than technical considerations govern the validity of an indictment." *Id.; see Chilcote*, 724 F.2d at 1505.

Though the variations between statute and indictment were "slight" in the above-discussed cases, this

court has affirmed convictions where a greater variation has appeared. *See United States v. Mullens*, 583 F.2d 134 (5th Cir.1978).[3] In *Mullens* the Fifth Circuit acknowledged that the statute itself (21 U.S.C. § 662) failed to include an element of the offense. "[A] more difficult problem is created by the absence of language in the statute requiring the receipt of a thing of value to be in connection with the performance of official duties." *Mullens*, 583 F.2d at 140-41. The court considered a First Circuit opinion in which the court engrafted the missing requirement upon the statute. *See United States v. Seuss*, 474 F.2d 385 (1st Cir.1973), *cert. denied*, 412 U.S. 928, 93 S.Ct. 2751, 37 L.Ed.2d 155 (1973). Legislative history and administrative interpretation supported the First Circuit's stance in that case. The Fifth Circuit likewise adopted the judicially created element. Then, the Fifth Circuit examined the indictment. Though the indictment did not contain language identical to the *Seuss* formulation, the court found that it contained sufficient facts to establish the required element. "Unless we attach some talismanic significance to the precise language of *Seuss*, the indictment is sufficient." *Mullens*, 583 F.2d at 141.

The above-discussed standards and analyses properly may be applied to the present case. The indictment must be examined as a whole, and it need not recite certain "magic words." In Count Four, the government specifically charged Italiano with a mailing in conjunction with a scheme or artifice to defraud, in violation of "Title

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[3] This court adopted all decisions of the former Fifth Circuit Court of Appeals decided prior to October 1, 1981. *See Bonner v. Prichard*, 661 F.2d 1206 (11th Cir.1981).

18, United States Code, Sections 1341 and 2." This specific reference to section 1341 permits the court to examine the statutory language to determine whether appellant received adequate notice of the charge against him. *See Chilcote* and *Stefan, supra.* As previously quoted, the statute provides ample notice that one may not participate in "any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises. . . . " 18 U.S.C. § 1341. The *McNally* opinion makes clear that the statute is not to be read in the disjunctive. *See* Discussion, *supra.* The indictment then, through the incorporation of the statute, informs Italiano that he was charged with using the United States' mails in furtherance of a scheme "to deprive another of money or property by means of false or fraudulent pretenses, representations, or promises." *Carpenter,* ___ U.S. at ___, 108 S.Ct. at 321. However, in light of the recent upheaval in the law pursuant to the *McNally* opinion, scrutiny beyond this specific reference is necessary to make certain of the sufficiency of this indictment.

Though each count of an indictment is generally considered as if it were a separate indictment, *Dunn v. United States,* 284 U.S. 390, 393, 52 S.Ct. 189, 190, 76 L.Ed. 356, 359, "[a]llegations made in one count may be incorporated by reference in other counts." 1 Wright, Federal Practice and Procedure: Criminal 2d § 123; *United States v. Kilroy,* 523 F.Supp. 206, 210 (E.D. Wis.1981). However, such incorporation by reference must be done expressly. *Davis v. United States,* 357 F.2d 438 (5th Cir. 1966). Assuming *arguendo* that the reference in the indictment to section 1341 does not suffice, the requisite specificity is

accomplished by realleging and incorporating by reference the relevant counts and paragraphs of the indictment.

In light of *McNally* and *Carpenter*, the elements of the crime of mail fraud include (1) the existence of a scheme to defraud some victim[s] of money or property, and (2) the use of the mails in furtherance of the scheme. *Accord United States v. Gimbel*, 830 F.2d 621, 626 (7th Cir.1987). A plain reading of this indictment would have informed appellant that he had been charged with using the United States' mails in furtherance of a scheme to bribe county commissioners to award a cable television franchise to Coaxial based not on the competitiveness of that company's bid but rather upon Coaxial's bribe.

Congress has enacted legislation to "establish a national policy concerning cable communications." *See* 47 U.S.C. § 521, *et seq.* Among other purposes identified in section 521 are both the establishment of franchise procedures and standards and the establishment of guidelines for the exercise of Federal, State and local authority with respect to the regulation of cable systems. Section 522 defines a franchise as "an initial authorization, or renewal thereof . . . , issued by a franchising authority [a governmental entity], . . . which authorizes the construction or operation of a cable system. . . . " 47 U.S.C. § 522(8). Pursuant to this legislation, courts have held that local franchising processes are an acceptable means of regulating the cable television industry. *See e.g. Tribune-United Cable v. Montgomery County*, 784 F.2d 1227 (4th Cir.1986); *Rollins Cablevue, Inc. v. Saienni Enterprises*, 633 F.Supp. 1315 (D.Del, 1986); *Central Telecommunications v.*

TCI Cablevision, 610 F.Supp. 891 (W.D.Mo. 1985). An additional objective of the legislation is the establishment of "an orderly process for franchise renewal which protects cable operators against unfair denials of renewal. . . . " 47 U.S.C. § 521(5). Both the use of the term "franchise" and the specifically provided for protection against arbitrary denial or revocation of such clearly bring cable television franchises within the common law concept of a "franchise."

"Franchises are *property* and are frequently invested with the attributes of property generally." 37 C.J.S. Franchises § 8 (1943) (emphasis added). The term "franchise" has been used to refer to "a grant by the state to some person, natural or corporate, of some privilege or power, not common to the people generally, with respect to property or rights subject to the control of the state or of some agency of the state." 37 C.J.S. Franchises § 5 (1943).

Importantly, Florida regards franchises as property. "A franchise owes its existence to a contract between the sovereign power and the grantee. Nevertheless, it is regarded by the law as property within the meaning of the Constitution. . . . " 27 Fla. Jur.2d Franchises From Government § 2 (1981) and cases cited therein.

Clearly the cable television franchise held by the County of Hillsborough for the people of that county to be awarded to some commercial entity is "property," and the attempt by appellant to defeat the competitive bidding process and to secure the cable television franchise by bribery is a scheme to deprive the county and its people of that property. Therefore, even assuming that the indictment's specific reference to the statute was not

sufficient notice, the specifically incorporated counts and paragraphs provide the specificity required to ensure the sufficiency of the indictment.

The instant case is distinguishable from *United States v. Gimbel*, 830 F.2d 621 (7th Cir.1987), in which "the 'scheme' consisted of depriving the Treasury Department of Currency Transaction Reports and other 'accurate and truthful information and data.' " *Id* at 626. *Gimbel*, like *McNally*, involved the failure of individuals to provide information to government officials whose actions might have been affected by the disclosure. *Id.* at 627.[4] The *Gimbel* indictment, then, alleged not that the defendant defrauded the government of money or property but rather that he failed to provide information to the government. In the case presently under consideration, appellant Italiano utilized the United States' mails to defraud the government of a franchise, *i.e.*, property. Such conduct is prohibited by section 1341.

Finally, the indictment incorporated by reference the Florida bribery statutes,[5] thus clearly noticing appellant that he was charged with bribing public officials in connection with official acts. An allegation charging a violation of state law, a fatal omission identified by the Supreme Court in *McNally*, is thus conspicuously

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[4] The *Gimbel* court states that the Supreme Court found the indictment in McNally deficient. In reality, the Court held the jury instructions improper. "We hold, therefore, that the jury instruction on the substantive mail fraud count permitted a conviction for conduct not within the reach of § 1341." *McNally*, 483 U.S. at ___, 107 S.Ct. at 2882, 97 L.Ed.2d at 303.

[5] *See* Appendix.

included in the indictment before this court. Further, the violations defined in those statutes inherently involve the deprivation of money or property. Fiduciaries have no right to economic benefits acquired through the breach of their fiduciary duties. "[T]he benefit properly belongs to the entity to whom the fiduciary has a duty." *United States v. Runnels*, 833 F.2d 1183, 1187 (6th Cir.1987). Justice Stevens pointed out in *McNally* that "prosecutions of corrupt officials who use the mails to further their schemes may continue since it will frequently be possible to prove some loss of money or property." *McNally*, 483 U.S. at ___, 107 S.Ct. at 2890, 97 L.Ed.2d at 313 (Stevens, J., dissenting). Such loss of money or property can be found where an agent (a public official) accepts bribes or kickbacks as a result of a violation of his fiduciary duty to his principal. *Id.* at ___, n.10, 107 S.Ct. at 2890 n. 10, 97 L.Ed.2d at 313 n. 10 (Stevens, J., dissenting).

The acceptance by the county commissioners of Italiano's bribe constitutes such a breach of the commissioner's fiduciary duty to their principal – the county and the public. It follows, then, that the commissioners are required to account to their principal for the money that they received. *See United States v. Carter*, 217 U.S. 286, 306, 30 S.Ct. 515, 520, 54 L.Ed. 769 (1910). Appellant Italiano, then, aided and abetted certain county commissioners in the violation of their fiduciary duty. *See* 18 U.S.C. § 2. The bribe paid to the commissioners rightly belonged to the county. By failing to account to the county, the commissioners, and hence Italiano, deprived the county of money.

This case is therefore not at all like the situation presented in *McNally*. The Supreme Court specifically

pointed out that the actions of the principals in *McNally* were not a violation of state law. That being the case, the commissions paid to the individuals in *McNally* were not funds belonging to or controlled by the state. In the instant case, the corrupt county commissioners, and therefore Italiano, appropriated money in the form of the bribes that properly belonged to the county. The relevant Florida statutes expressly forbade such appropriation. These statutes, in concert with the fiduciary duty doctrine, clearly establish that both the county and the public were deprived of "money," and Count Four of the indictment, which incorporated by reference the bribery statute and specifically alleged a violation of 18 U.S.C. § 2, sufficiently notices appellant of such an allegation.

For all of the above reasons, the indictment in this case is constitutionally sufficient both to inform appellant of the charge against him and to enable him to plead an acquittal or conviction in bar of future prosecutions. *See United States v. Goodman*, 605 F.2d 870, 885 (5th Cir.1979); *United States v. Varkonyi*, 645 F.2d 453, 456 (5th Cir. Unit A 1981). Therefore, the question becomes whether appellant was somehow prejudiced by the inclusion in the indictment of the now improper "intangible rights to good government" allegations.

A defendant's "right to a grand jury is not normally violated by the fact that the indictment alleges more crimes or other means of committing the same crimes". *United States v. Miller*, 471 U.S. 130, 136, 105 S.Ct. 1811, 1815, 85 L.Ed.2d 99 (1985). Striking allegations from an indictment to narrow the scope of the scheme alleged is permitted." *United States v. Lee*, 667 F.Supp. 1404, 1417 (D.Colo.1987), citing *Miller*, 471 U.S. at 136, 105 S.Ct. at

1815. In *Lee*, a post-*McNally* case, the court struck allegations relating to the intangible rights theory.

Clearly, the essence of the scheme to defraud the public of its right to "good government" consisted of the scheme to procure the cable television franchise by fraudulent means. In exorcising the "good government" language from the indictment, this court would merely remove the gloss while leaving intact the essential elements of the crime. Thus, it could not be said that appellant was prejudiced by the inclusion of the "good government" allegations, and those allegations may be stricken without negating the conviction.

The trial court properly failed to grant appellant's motion to dismiss the indictment. I would affirm the appellant's conviction.

APPENDIX

COUNT FOUR

1. The Grand Jury realleges and incorporates by reference paragraphs one through three of Count THREE of this Indictment.

(COUNT THREE)

[1.] The Grand Jury realleges and incorporates by reference the INTRODUCTION of this Indictment.

(INTRODUCTION)

[1.] At all times material to this indictment,

(1) The Board of County Commissioners of Hillsborough County, Florida served as the chief legislative

and policy making board for Hillsborough County (a non-charter county), as established by the Constitution and the statutes of the State of Florida.

(2) As the chief legislative and policy making body for Hillsborough County, the Board of County Commissioners, among other responsibilities, served as the final authority on zoning, applications for alcoholic beverage hearings (so-called wet-zoning), borrow pit permits, cable television franchise agreements, road paving contracts, waste resource recovery projects, waste hauling franchise agreements, garbage rate increases and waste disposal sites and constituted an "enterprise" as that term is defined in Title 18, United States Code, Section 1961(4), the activities of which affected interstate commerce.

(3) The Hillsborough County Board of County Commissioners was composed of five (5) commissioners, at any one time, each representing a geographical district in Hillsborough County and elected, in general elections, to four-year terms.

(4) ROBERT E. CURRY was a Hillsborough County Commissioner representing District No. 1 from in or about November, 1972 through in or about November, 1980.

(5) FRED ARTHUR ANDERSON was a Hillsborough County Commissioner representing District No. 1 from in or about November, 1980, until in or about February, 1983.

(6) Robert Bondi was a Hillsborough County Commissioner representing District No. 2 from in or about November, 1974 until in or about November, 1978.

(7) Jan Platt was a Hillsborough County Commissioner representing District No. 2 having taken office in or about November, 1978.

(8) Joel Koford was a Hillsborough County Commissioner representing District No. 3 from in or about October, 1976 until in or about March, 1978.

(9) Charles Frank Bean, III, was a Hillsborough County Commissioner representing District No. 3 from in or about April 1, 1978, until in or about November, 1980.

(10) JOSEPH HENRY KOTVAS, JR., was a Hillsborough County Commissioner representing District No. 3 from in or about November, 1980, until in or about February, 1983.

(11) Francis H. Davin was a Hillsborough County Commissioner representing District No. 4 from in or about November, 1974 until in or about November, 1982.

(12) Rodney Colson was a Hillsborough County Commissioner representing District No. 4 having taken office in November, 1982.

(13) Robert Lester was a Hillsborough County Commissioner representing District No. 5 until in or about November, 1976.

(14) Jerry Merle Bowmer was a Hillsborough County Commissioner representing District No. 5 from on or about November 16, 1976, until in or about February, 1983.

(15) Andrew Argintar was a Zoning Hearing Officer for the Board of County Commissioners of Hillsborough County, Florida.

(16) ROBERT A. CANNELLA was an attorney, licensed to practice law in the State of Florida.

(17) JOHN DAVID DEMMI was an attorney, licensed to practice law in the State of Florida.

(18) LAURENCE I. GOODRICH was an attorney, licensed to practice law in the State of Florida.

(19) PAUL B. JOHNSON was an attorney, licensed to practice law in the State of Florida.

(20) MICHAEL SIERRA was an attorney, licensed to practice law in the State of Florida.

(21) JOSEPH HENRY ANDERSON, JR. was President and a Director of ANDERSON CONTRACTING COMPANY, INC., a Florida corporation engaged in the business of general contracting, and was Vice-President of COLUMBIA PAVING, INC., a Florida corporation engaged in the business of road construction.

(22) LOIS BAILEY was a resident of College Park, Georgia.

(23) JOHN DeCARLUCCI was a resident of Hillsborough County, and was President and Director of John Dee Construction Company, Inc., a Florida corporation engaged in the business of contracting.

(24) MARCELLINO ECHEVARRIA, also known as MARCELO ECHEVARRIA, was a resident of Hillsborough County, and was owner and President of SCAN REALTY SERVICES, INC., a Florida Corporation engaged in the business of brokering real estate transactions.

(25) MANUEL FERNANDEZ was a resident of Hillsborough County and did business as contractor in the State of Florida.

(26) RONNIE D. FULLWOOD was a resident of Hillsborough County and was the owner and President of Fulwood Farms, Inc., a Florida corporation engaged in the business of commercial farming.

(27) LEROY R. GONZALEZ, JR. was a resident of Hillsborough County and did business as a seller of automobile tires under the name of Bay Area Tire and Service Center.

(28) RICHARD D. GUAGLIARDO was a resident of Hillsborough County and did business as a supplier of fuel oil in the name of RICHARD'S FUELS.

(29) NELSON ITALIANO was a resident of Hillsborough County and President of Baldwin-Italiano, Inc., a Florida corporation, engaged in the insurance business.

(30) MICHAEL T. NOVAK was a resident of Hillsborough County and was President of Noport Investments, Inc., a Florida corporation engaged in the business of real estate development.

(31) ALEXANDER G. RAPPAPORT, also known as SANDY RAPPAPORT, was a resident of Hillsborough County and the Vice-President of Noport Investments, Inc.

(32) CESAR AUGUSTUS RODRIGUEZ was a resident of Hillsborough County.

(33) LOUIS ROCHA was a resident of Hillsborough County, and did business as a real estate developer.

(34) HAROLD L. ROSSITER, also known as HAP ROSSITER, hereinafter sometimes referred to as HAROLD L. "HAP" ROSSITER, was a resident of Hillsborough County, President of Environmental Housing, Inc., a Florida corporation engaged in the housing construction business and at times material herein did business, or attempted to do business under the fictitious trade name of Technical Assistance Consulting Service.

(35) CLAUDE TANNER was a resident of Hillsborough County and President of SUBURBAN DISPOSAL SERVICE, INC., a Florida corporation engaged in the waste disposal business in Hillsborough County.

(36) EUGENE THOMASON was a resident of Hillsborough County, doing business as Gene's Country Kitchen.

(37) CULLEN H. WILLIAMS, also known as BUSTER WILLIAMS, hereinafter sometimes referred to as CULLEN H. "BUSTER" WILLIAMS, was a resident of Hillsborough County, and President of ALAFIA LAND DEVELOPMENT CORPORATION, INC., a Florida corporation.

[2.] At all times material herein, Florida Statute § 838.015 provided:

> (1) "Bribery" means corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept for himself or another, any pecuniary or other benefit with an intent or purpose to influence the performance of any act or omission which the person believes to be, or the public servant represents as being, within the official discretion of a public servant, in

violation of a public duty, or in performance of a public duty.

(2) Prosecution under this section shall not require any allegation or proof that the public servant ultimately sought to be unlawfully influenced was qualified to act in the desired way, that he had assumed office, that the matter was properly pending before him or might by law properly be brought before him, that he possessed jurisdiction over the matter, or that his official action was necessary to achieve the person's purpose.

(3) Any person who commits bribery is guilty of a felony in the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

[3.] At all times material herein, Florida Statute § 838.016 provided:

(1) It is unlawful for any person corruptly to give, offer, or promise to any public servant, or, if a public servant, corruptly to request, solicit, accept, or agree to accept, any pecuniary or other benefit not authorized by law, for the past, present, or future performance, nonperformance, or violation of any act or omission which the person believes to have been, or the public servant represents as having been, either within the official discretion of the public servant, in violation of a public duty, or in performance of a public duty. Nothing herein shall be construed to preclude a public servant from accepting rewards for services performed in apprehending any criminal.

* * *

(3) Prosecution under this section shall not require that the exercise of influence or official discretion, or violation of a public duty or performance of a public duty, for which a pecuniary

or other benefit was given, offered, promised, requested, or solicited was accomplished or was within the influence, official discretion, or public duty of the public servant whose action or omission was sought to be rewarded or compensated.

(4) Whoever violates the provisions of this section shall be guilty of a felony of the third degree, punishable as provided in § 775.082, § 775.083, or § 775.084.

[4.] At times material herein, Florida Statute § 112.3143 required disclosure of the nature of any personal, private or professional interest a public officer had which inured to his special private gain within 15 days after the vote occurred.

[5.] At times material herein Florida Statute § 112.3145 required disclosure of financial interests of local officers including all sources of income in excess of 5 percent of his gross income except a business partners' sources of income; and a list of all persons, business entities or other organizations from whom he received certain gifts in excess of $100.00 in value.

[6.] At times material herein Florida laws regulating Campaign Financing provided, in pertinent part:

Florida Statute 106.07 Reports; certification and filing. –

(1) Each campaign treasurer designated by a candidate or political committee pursuant to s. 106.021 shall file regular reports of all contributions received, all all (sic) expenditures made, by or on behalf of such candidate or political committee.

* * *

Florida Statute 106.08 Contributions; limitations on. –

(1) No person or political committee shall make contributions to any candidate or political committee in this state, for any election, in excess of the following amounts:

(a) To a candidate for countywide office or to a candidate in any election conducted on less than a county wide basis, $1,000.

* * *

Florida Statute 106.09 Cash contributions and contribution by cashier's checks. –

(1) No person shall make or accept a cash contribution or contribution by means of a cashier's check in excess of $100.

[2.] From in or about November 1976, and continuously thereafter up to the date of this Indictment, in the Middle District of Florida, and elsewhere,

FRED ARTHUR ANDERSON,

JOSEPH HENRY ANDERSON, JR.,

ANDERSON CONTRACTING COMPANY, INC.,

COLUMBIA PAVING, INC.,

LOIS BAILEY,

ROBERT A. CANNELLA,

ROBERT E. CURRY,

JOHN DeCARLUCCI,

JOHN DAVID DEMMI,

MARCELLINO ECHEVARRIA,

a/k/a Marcello Echevarria,

MANUEL FERNANDEZ,

LEROY R. GONZALEZ, JR.

LAURENCE I. GOODRICH,

RICHARD D. GUAGLIARDO,

NELSON ITALIANO,

PAUL B. JOHNSON,

JOSEPH HENRY KOTVAS, JR.,

MICHAEL T. NOVAK,

ALEXANDER G. RAPPAPORT,

a/k/a Sandy Rappaport,

LOUIS ROCHA,

CESAR AUGUSTUS RODRIGUEZ,

HAROLD LEONARD ROSSITER,

a/k/a Hap Rossiter,

MICHAEL SIERRA,

CLAUDE TANNER,

EUGENE THOMASON,

and

CULLEN H. WILLIAMS,

a/k/a Buster Williams,

and others who are both known and unknown to the Grand Jury, knowingly and willfully devised and intended to devise a scheme and artifice to defraud the citizens of Hillsborough County, and the citizens of the State of Florida generally of their right to the following:

a) conscientious, loyal, faithful, disinterested and unbiased services, decisions, actions and performance of official duties of the Board of County Commissioners, Hillsborough County, Florida; and

b) to have the business of the Board of County Commissioners, Hillsborough County, Florida, and its affairs conducted honestly and impartially, free from deceit, craft, trickery, corruption, fraud, undue influence, dishonesty, conflict of interest, unlawful obstruction and impairments and in accordance with the laws of the State of Florida and Hillsborough County.

[3.] The substance of which scheme to defraud and its manner and means are set forth in paragraphs 3 through 11 of Count One of this Indictment and the grand jury realleges and incorporates by reference those paragraphs as though fully set forth herein.

The Manner and Means of the Conspiracy

A. *In General*

(3.) It was part of the conspiracy that the defendants and others would directly and indirectly offer, promise, give, solicit, request, agree to accept and accept benefits, including pecuniary benefits, some pecuniary

benefits disguised as cash campaign contributions to influence the performance of an act or for the past, present or future performance of an act within the official discretion of members of the Board of County Commissioners of Hillsborough County, Florida and to insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy.

(4.) It was further a part of the conspiracy that defendants and others would introduce, refer or otherwise bring to the attention of each other, individuals, including themselves, willing to influence the performance of an act within the official discretion of Hillsborough County Commissioners by paying bribes directly, or indirectly through fees or other charges, and to insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy.

(5.) It was further a part of the conspiracy that defendants and others would give Hillsborough County Commissioners benefits, including pecuniary benefits, some pecuniary benefits disguised as cash campaign contributions, free repairs, free vacation accommodations, meals, and other benefits to maintain general influence over the performance of acts within the official discretion of Hillsborough County Commissioners, and to promote, foster, further, facilitate and enlarge the conspiracy.

(6.) It was further a part of the conspiracy that defendants and others would perform acts designed to insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy, including monitoring the progress of allegations which might expose portions of the enterprise or its racketeering activity, or generate political

harm to corrupt Hillsborough County Commissioners, that had been referred to the Hillsborough County, Florida State Attorneys Office.

(7.) It was further a part of the conspiracy that defendants and others would use, fail to use, or manipulate the rules, regulations, ordinances or procedures of the Hillsborough County Board of County Commissioners to insulate, protect, promote, foster, further, facilitate and enlarge the direct and indirect offering, promising, giving, soliciting, requesting, agreeing to accept and acceptance of benefits, including pecuniary benefits.

(8.) It was further a part of the conspiracy that defendants and others would obtain, or attempt to obtain, a corrupt majority of the members of the Board of County Commissioners of Hillsborough County, by means which included:

(a) supporting the election or reelection of corrupt Hillsborough County Board of County Commissioners;

(b) causing or attempting to cause, corrupt candidates for the Board of County Commissioners of Hillsborough County, to run against non-corrupt candidates for the Board of County Commissioners of Hillsborough County;

(c) discouraging, discrediting and impairing the ability of non-corrupt Hillsborough County Board of County Commissioners to perform their public duties; or

(d) recruiting Hillsborough County Board of County Commissioners into the conspiracy.

(9.) It was further a part of the conspiracy that defendants and others would and did perform acts for the purpose of acquiring, maintaining, protecting and concealing interests, profits and proceeds derived from the giving of benefits, including pecuniary benefits as described in the above paragraphs.

(10.) It was further a part of the conspiracy that defendants would and did misrepresent, conceal and hide, and cause to be misrepresented, concealed and hidden, the objectives of and acts done in furtherance of the conspiracy including engaging in obstruction of justice and criminal investigations.

B. *Roles of the Defendants*

(11.) It was further a part of the conspiracy that defendants played one or more of the following roles, among others, in furthering the affairs of the enterprise:

a. Corrupt Hillsborough County Commissioners who:

(1) would and did represent, and would cause, use and authorize others to represent, that they had control and/or influence over the disposition of acts within the official discretion of the Board of County Commissioners of Hillsborough County;

(2) would and did solicit, request, agree to accept and accept, and would and did cause, use and authorize other defendants, and others, to solicit, request, agree to accept and accept benefits, including pecuniary benefits, for themselves and others because of their influence over

acts within the official discretion of the Board of County Commissioners of Hillsborough County;

(3) would and did exercise their discretion over acts within their official discretion to promote and facilitate the giving of benefits, including pecuniary benefits which were given with an intent and purpose to obtain specific or general influence over acts within their official discretion;

(4) would act as a conduit to other Hillsborough County Commissioners, for benefits, including pecuniary benefits, to influence acts, or for the past, present or future performance of acts within their official discretion;

(5) would and did refer or introduce individuals to others, and would and did accept referral or introduction of individuals from others, with an intent and purpose of soliciting, requesting, agreeing to accept and accepting benefits, including pecuniary benefits, to influence acts within their official discretion and to insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy;

(6) would use or manipulate, among themselves, or together with others the rules, regulations, procedures or ordinances of the Board of County Commissioners of Hillsborough County to insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy;

(7) would, themselves or together with others insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy.

(b) Brokers, middlemen, or insulators who would do, and did perform one or more of the following:

(1) would represent that they had the ability to control and/or influence the disposition of matters, petitions, applications and other discretionary actions of the Board of County Commissioners of Hillsborough County;

(2) would and did offer, promise, give, solicit, request, agree to accept and accept benefits, including pecuniary benefits, with intent and purpose to influence discretionary acts of the Board of County Commissioners of Hillsborough County Commissioners of Hillsborough County [sic] for the purpose of receiving a benefit for themselves or others;

(3) would make and accept referrals and introductions of individuals with an interest and purpose of offering, promising, giving, soliciting, requesting, agreeing to accept and accepting benefits, including pecuniary benefits, to influence acts within the official discretion of the Board of County Commissioners of Hillsborough County and to insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy;

(4) would use or manipulate, together with others, the rules, regulations, procedures or ordinances of the Board of County Commissioners of Hillsborough County;

(5) would, themselves or together with others insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy.

c. Source bribe payors, who would and did perform one or more of the following:

(1) would locate, seek, contract for, possess or have an interest which would benefit from influencing acts

within the official discretion of the Board of County Commissioners of Hillsborough County, in real estate, businesses or other property which were, or which could be brought within the official discretion of the Board of County Commissioners for Hillsborough County;

(2) would petition, request, apply for, bid or propose upon, or otherwise have an interest in petitions, applications or other matters or actions which were within the official discretion of the Board of County Commissioners for Hillsborough County;

(3) would seek, and accept, introduction and referral to corrupt Hillsborough County Commissioners and others, with an intent and purpose to offer, promise and give benefits, including pecuniary benefits to influence acts within the official discretion of corrupt Hillsborough County Commissioners;

(4) would offer, promise and give benefits, including pecuniary benefits, with an intent and purpose to influence the performance of, or for the past, present or future performance of, an act with the official discretion of the Board of County Commissioners of Hillsborough County for the purpose of receiving a benefit for themselves or others;

(5) would use or manipulate, together with corrupt Hillsborough County Commissioners, and others the rules, regulations, procedures or ordinances of the Board of County Commissioners of Hillsborough County;

(6) would themselves and together with others insulate, protect, promote, foster, further, facilitate and enlarge the conspiracy.

The Defendants and the Mailing

2. It was further a part of the scheme that defendant ROBERT E. CURRY, NELSON ITALIANO and others would and did engage in the acts set forth in paragraph 14 of COUNT TWO of this Indictment, which paragraph is incorporated by reference herein.

(14.) Between in or about January, 1980 and in or about December, 1980, Nelson Italiano and others, corruptly offered, promised and gave Charles Frank Bean III and ROBERT E. CURRY, public servants, and Charles Frank Bean III and ROBERT E. CURRY, corruptly requested, solicited, agreed to accept and accepted, a benefit with an intent and purpose to influence an act which Nelson Italiano believed to be, and Charles Frank Bean III represented as being, within the official discretion of Charles Frank Bean III and ROBERT E. CURRY relating to Cable Television Franchise Agreement No. 80-563; chargeable under Florida Statutes, Section 838.015, and an act of racketeering involving bribery as defined by Title 18, United States Code, Section 1961(1).

3. On or about August 8, 1980, the defendants,

ROBERT E. CURRY

and

NELSON ITALIANO,

and others who are both known and unknown to the Grand Jury, for the purpose of executing the aforesaid scheme and artifice to defraud, and attempting to do so,

knowingly caused to be placed in an authorized depository for mail matter to be delivered by the United States Postal Service, an envelope containing a letter to Rudy Spoto from Dennis J. McGillicuddy addressed to:

Mr. Rudy Spoto

Rudy Spoto, Inc.

P.O. Box 393

Tampa, Florida 33601

In violation of Title 18, United States Code, Sections 1341 and 2.

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

NO. 89-3079

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

NELSON ITALIANO,

Defendant-Appellant.

Appeal from the United States District Court for the Middle District of Florida

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ON PETITIONS FOR REHEARING AND SUGGESTIONS OF REHEARING IN BANC

(Opinion February 20, 1990, 11 Cir., 19 ___, ___ F.2d ___).

(April 18, 1990)

Before KRAVITCH and CLARK, Circuit Judges, and ATKINS*, Senior Judge.

PER CURIAM:

(X) The Petitions for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing in banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are DENIED.

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*Honorable Clyde Atkins, Senior Judge, United States District Court for the Southern District of Florida, sitting by designation.

( ) The Petitions for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions of Rehearing In Banc are also DENIED.

( ) A member of the Court in active service having requested a poll of the reconsideration of this cause in banc, and a majority of the judges in active service not having voted in favor of it, Rehearing In Banc is DENIED.

ENTERED FOR THE COURT:

/s/ Phyllis Kravitch
United States Circuit Judge

United States Code, Title 18 (1985).

§ 1341. Frauds and swindles

Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, or to sell, dispose of, loan, exchange, alter, give away, distribute, supply, or furnish or procure for unlawful use any counterfeit or spurious coin, obligation, security, or other article, or anything represented to be or intimated or held out to be such counterfeit or spurious article, for the purpose of executing such scheme or artifice or attempting so to do, places in any post office or authorized depository for mail matter, any matter or thing whatever to be sent or delivered by the Postal Service, or takes or receives therefrom, any such matter or thing, or knowingly causes to be delivered by mail according to the direction thereon, or at the place at which it is directed to be delivered by the person to whom it is addressed, any such matter or thing, shall be fined not more than $1,000 or imprisoned not more than five years, or both.

§ 3282. Offenses not capital

Except as otherwise expressly provided by law, no person shall be prosecuted, tried, or punished for any offense, not capital, unless the indictment is found or the information is instituted within five years next after such offense shall have been committed.

§ 3288. Indictment where defect found after period of limitations

Whenever an indictment is dismissed for any error, defect, or irregularity with respect to the grand jury, or an indictment or information filed after the defendant waives in open court prosecution by indictment is found otherwise defective or insufficient for any cause, after the period prescribed by the applicable statute of limitations has expired, a new indictment may be returned in the appropriate jurisdiction within six calendar months of the date of the dismissal of the indictment or information, or, if no regular grand jury is in session in the appropriate jurisdiction when the indictment or information is dismissed, within six calendar months of the date when the next regular grand jury is convened, which new indictment shall not be barred by any statute of limitations.

(2)

No. 90-99

In the Supreme Court of the United States

OCTOBER TERM, 1990

NELSON A. ITALIANO, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that an indictment alleging that petitioner had violated the mail fraud statute was substantially similar to a prior indictment that had been dismissed, so that the new indictment was timely under 18 U.S.C. 3288.

2. Whether a cable television franchise constitutes property within the meaning of the mail fraud statute, 18 U.S.C. 1341.

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UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A16) is reported at 894 F.2d 1280. The opinion of the district court denying petitioner's pretrial motions (Pet. App. A17-A22) is reported at 701 F. Supp. 205. An opinion of the court of appeals reversing petitioner's conviction after his first trial (Pet. App. A23-A76) is reported at 837 F.2d 1480.

JURISDICTION

The judgment of the court of appeals was entered on February 20, 1990. A petition for rehearing was denied on April 18, 1990. Pet. App. A77-A78. The petition for a writ of certiorari was filed on July 13, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Florida, petitioner was convicted on one count of mail fraud (18 U.S.C. 1341) and was sentenced to two years' imprisonment. Relying on *McNally* v. *United States*, 483 U.S. 350 (1987), the court of appeals reversed petitioner's conviction. Pet. App. A23-A76. A new indictment was returned, again charging petitioner with one count of mail fraud. Following a jury trial, petitioner was convicted again and was sentenced to four months' imprisonment, to be followed by three years' probation and 200 hours of community service. The court of appeals affirmed. Pet. App. A1-A16.

1. Petitioner worked for Coaxial Communications of the Suncoast, Inc., a corporation formed to obtain cable television franchises. The evidence at both trials showed that in 1980 petitioner bribed several county commissioners in Hillsborough County, Florida, in order to secure a cable television franchise in the county for Coaxial Communications. Pet. App. A2-A4.

The original indictment charged petitioner with mail fraud under an "intangible rights" theory. That is, the indictment alleged that petitioner had bribed the commissioners as part of a scheme to defraud the citizens of Hillsborough County of their right to honest government. Pet. App. A8. In light of this Court's decision in *McNally*, which was announced following petitioner's first trial and which "emasculated the vitality of the intangible rights doctrine" (*id.* at A29), the court of appeals reversed petitioner's conviction.

Less than six months later, another grand jury returned a new mail fraud indictment against peti-

tioner. This time the indictment alleged that petitioner had bribed the commissioners as part of a scheme to deprive the government of Hillsborough County of the cable television franchise. Pet. App. A9. Petitioner moved to dismiss the second indictment on two grounds. First, he claimed that the new indictment was barred by the five-year statute of limitations, 18 U.S.C. 3282, and was not saved under 18 U.S.C. 3288, which allows the filing of a new indictment within six months of the dismissal of a defective indictment. The basis for petitioner's timeliness challenge was the contention that the new indictment alleged facts beyond the scope of the original indictment. Second, petitioner argued that the new indictment failed to state an offense. The basis for that argument was the allegation that a cable television franchise is not "property" under *McNally*, and hence a scheme to obtain such a franchise is not proscribed by the mail fraud statute.

The district court rejected both claims. The court observed that "the basic factual allegations of the two indictments are the same: an alleged scheme to bribe members of the Board of the Hillsborough County Commissioners in order to obtain a cable television franchise agreement." Pet. App. A19. Accordingly, the court held that the indictment was not barred by the statute of limitations. The court also rejected petitioner's alternative argument, holding that the cable television franchise "clearly qualifies as 'property' whether characterized as tangible or intangible property." *Id.* at A21.

2. Following his conviction, petitioner renewed his statute of limitations claim on appeal, but he did not raise the argument that a cable television franchise is not property within the meaning of the mail fraud

statute.[1] The court of appeals rejected petitioner's argument that the indictment was untimely. The court pointed out that the central policy underlying statutes of limitations is notice to the defendant. If the charges in old and new indictments are substantially the same, the court held, a defendant has been given adequate notice of the charges against him and an indictment is timely under 18 U.S.C. 3288. Pet. App. A5-A7. Thus, the court held that an indictment is saved by Section 3288 if it "does not broaden or substantially amend the original charges 'tolled' by the previous indictment." Pet. App. A7.

The court then compared the charges in the second indictment and petitioner's original indictment. The court noted that the two indictments charged the same statutory violation, the same mailing in furtherance of the scheme, and the same underlying transaction as the purpose of the bribe. The only difference was in the indictment's characterization of the object of the scheme. Pet. App. A7-A11. The court found that difference to be immaterial. Since the factual allegations were the same in both indictments (*id.* at A12), the court concluded that any disparity between the two indictments did not "hinder[] [petitioner's] understanding of the conduct for

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[1] While petitioner's brief raised only the statute of limitations issue, petitioner sought to adopt any arguments raised in an amicus brief to be filed by Dennis McGillicuddy, Coaxial Communications' owner. See Def't C.A. Br. 18. However, the court of appeals denied McGillicuddy's motion for leave to file an amicus brief, and petitioner did not then raise the argument that the franchise is not property. The government did not brief the issue in the court of appeals, and the court merely noted that it is clear under Florida law that a cable television franchise is property. Pet. App. A11 n.6.

which he would be held accountable or his ability to prepare a defense for that conduct." *Id.* at A13.

ARGUMENT

1. Petitioner does not challenge the legal standard that the court of appeals applied. Rather, he makes the essentially factual argument (Pet. 14-19) that the court of appeals erred in concluding that the second indictment was substantially similar to the original indictment.

The return of a new indictment after a dismissal is governed by 18 U.S.C. 3288. In a case such as this one, a new indictment is saved only if the charges in the two indictments are substantially the same. The court of appeals determined that the change in the object of the mail fraud scheme in the two indictments was not sufficient to render the charges in the two indictments different. Petitioner disagrees with that conclusion, but the court of appeals' ruling is in accord with the approach used by all the other courts that have faced the issue. *E.g.*, *United States* v. *Gengo*, 808 F.2d 1, 3-4 (2d Cir. 1986); *United States* v. *Grady*, 544 F.2d 598, 602 (2d Cir. 1976); *United States* v. *Charnay*, 537 F.2d 341, 354 (9th Cir.), cert. denied, 429 U.S. 1000 (1976); *United States* v. *Davis*, 714 F. Supp. 853, 864 (S.D. Ohio 1988); *United States* v. *Lyle*, 677 F. Supp. 1370, 1376-77 (N.D. Ill. 1988).[2] As the

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[2] Petitioner contends (Pet. 18) that the decision below conflicts with a decision of a district court, *United States* v. *O'Neill*, 463 F. Supp. 1205 (E.D. Pa. 1979), which involved a prosecution for false statements under 18 U.S.C. 1014. A superseding indictment filed outside the limitations period was based on the same transaction, but it alleged a different false statement from those alleged in the first indictment,

court of appeals concluded, the original indictment gave petitioner more than adequate notice of the charges against him.

2. Petitioner also argues (Pet. 6-14) that a cable television franchise is not property within the meaning of Section 1341 and *McNally*. Petitioner failed to raise this argument in the court below, see note 1, *supra*, and he therefore may not raise it here. *Delta Air Lines, Inc.* v. *August*, 450 U.S. 346, 362 (1981); *United States* v. *Lovasco*, 431 U.S. 783, 788 n.7 (1977).

In any event, there is no merit to petitioner's claim. As the court of appeals observed (Pet. App. A11 n.6), franchises are considered to be property under Florida law. See 27 Fla. Jur. 2d, *Franchises From Government* § 2 (1981).[3] Moreover, review is not warranted on account of the disagreement among the courts of appeals as to whether, apart from principles of state law, franchises and licenses constitute property before they have been granted by the issuing body. See Pet. 8-11.[4] Congress recently amended

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and the district court dismissed the indictment. 463 F. Supp. at 1207-1208. As the court below recognized (Pet. App. A12-A13), *O'Neill* differs from this case because in this case only the object of the scheme changed, not the factual allegations regarding the underlying scheme.

[3] While petitioner disagrees with the court of appeals' interpretation of Florida law (Pet. 11), that issue obviously does not warrant this Court's review.

[4] Contrary to petitioner's suggestion (Pet. 9 & n.27), this Court has not resolved that issue in his favor. In *Community Communications Co.* v. *Boulder*, 455 U.S. 40, 48 (1982), where the Court reversed the court of appeals' holding that a city was immune from compliance with the antitrust laws with respect to the granting of a cable television franchise, the Court merely noted that the court of appeals

the federal fraud statutes to provide that "a 'scheme or artifice to defraud' includes a scheme or artifice to deprive another of the intangible right of honest services." Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4508. The legislative history of the new provision explains that "[t]his section overturns the decision in *McNally v. United States* * * *. The intent is to reinstate all of the pre-*McNally* caselaw pertaining to the mail and wire fraud statutes without change." 134 Cong. Rec. S17,376 (daily ed. Nov. 10, 1988). Accordingly, whether a franchise is property under *McNally* is of no prospective importance. In any case arising in the future where a defendant bribes government officials in order to obtain a franchise or a license, it will be clear that the defendant engaged in a scheme proscribed by the mail fraud statute because bribery "deprives another of the intangible right to honest services."

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Acting Assistant Attorney General

LOUIS M. FISCHER
Attorney

SEPTEMBER 1990

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had distinguished the case from another on the ground that the city had "no proprietary interest" in the franchise.

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